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APPENDIX

Supreme Court of the United States

OCTOBER TERM, ~~1970~~ 1971

No. ~~5161~~ 69-5035

FRANK JOHNSON,

Appellant,

—v.—

LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

FILED APRIL 20, 1970
JURISDICTION NOTED NOVEMBER 9, 1970

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5161

FRANK JOHNSON,

Appellant,

—v.—

LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

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No. 202-984

STATE OF LOUISIANA

vs.

FRANK JOHNSON

INFORMATION FOR VIOL. R.S. 14-64

* * * *

New Orleans, Louisiana, Wednesday, March 13, 1968.

* * * *

Richard Buckley filed with the Court a Motion to Quash and a Motion to support the Motion to Quash.

New Orleans, Louisiana, Monday, March 18, 1968.

* * * *

The defendant appeared at the Bar of the Court accompanied by his counsel, R. Buckley, Esq. The Court then ruled that the State's answers to the Bill of Particulars were good and sufficient in law. The Court ruled also that the State's answers to the Prayer for Oyer were good and sufficient in law. The Court then heard the Motion to Quash and the Motion to Suppress. Frank Johnson then took the witness stand and was cross-examined by the State. Lt. T. Fields was called to the witness stand and was cross-examined by the defense. This matter was then recessed as an open matter until April 1, 1968.

New Orleans, Louisiana, Monday, April 1, 1968.

* * * *

The defendant appeared at the Bar of the Court accompanied by his counsel, R. Buckley, Esq. Byron Legendre was then called to the witness stand and was cross-examined by the defense. The Court then informed Mr. Buckley that the Court would go into the Motion to Quash. Frank Johnson then took the witness stand and was cross-examined by the State. The State then moved for a continuance before ruling in this matter, to which the defense objected. Objection was over-ruled and Mr. Buckley reserved a Bill of Exception.

New Orleans, Louisiana, Thursday, May 2, 1968

* * * *

The defendant appeared at the Bar of the Court accompanied by his counsel, Robert Buckley, Esq. This motion had been continued from April 1, 1968. Judge Bernard J. Bagert was then called to the witness stand and testified that what the State had previously marked S-1, the Magistrate Court minutes of Monday, January 22, 1968. The witness was then cross-examined by the defense. Mr. Oliver J. Donahue was called to the witness stand and identified that what the State had previously marked S-1 and S-2, a Magistrate Court form. The witness was then cross examined by the defense. The State then was cross-examined by the defense. The State then attempted to offer S-1 and S-2 into evidence. There was no objection by the defense. The Court ordered the exhibits marked and filed. Both State and defense was then informed by the Court to file memorandums by May 8, 1968, of which the ruling will be made on May 9, 1968.

New Orleans, Louisiana, May 9, 1968.

* * * *

The Court this day denied the Motion to Quash and the Motion to Suppress and Mr. Amadee, Esq. reserved 2 Bills of Exception. The defendant was then re-arraigned and entered a plea of not guilty.

New Orleans, Louisiana, Wednesday, May 15, 1968.

* * * *

* * * Jury returned at 2:28 P.M. Verdict of Jury: Guilty as charged. Jury was then polled and answered "yes" this was their verdict, 9 to 3. Sentencing was deferred until May 27, 1968.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202-984 Section "G"

STATE OF LOUISIANA

versus

FRANK JOHNSON

MOTION TO SUPPRESS EVIDENCE—Filed March 5, 1968

Now into Court comes FRANK JOHNSON, made defendant in the above numbered cause, through his attorney of record, RICHARD A. BUCKLEY, and on showing to the Court that certain evidence was seized in the City of New Orleans, which evidence forms the basis of the charge against him the above numbered cause, and on further showing to the Court that said evidence was seized by the New Orleans Police Department without benefit of an arrest warrant or search warrant or, the alternative, without benefit of a valid search warrant; that as a result of this illegal activity of the New Orleans Police Department, said evidence is not admissible, it is moved that the Honorable District Attorney for the Parish of Orleans, show cause on the day and date to be set by this Court why this evidence in the above numbered cause should not be suppressed.

/s/ RICHARD A. BUCKLEY

RICHARD A. BUCKLEY
New Orleans Legal Assistance Corp.
605 Carondelet Building
New Orleans, La. 70130
Attorney for Defendant

ORDER

Considering the foregoing motion to suppress evidence, in Case No. 202-984, assigned to this Section of the Court, it is ordered that the District Attorney for the Parish of Orleans, show cause on the ..... day of ....., 1968, why this evidence should not be suppressed.

_____

Judge

5/9/68

Denied

/s/ FRANK J. SHEA,
Judge, Section G

CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

No. 202-984, Section "G"

STATE OF LOUISIANA

vs.

FRANK JOHNSON

ANSWER TO MOTION TO SUPPRESS THE EVIDENCE—
Filed March 6, 1968

Now into this Honorable Court through the undersigned Assistant District Attorney comes the State of Louisiana and in answer to the defendant's Motion to Suppress the Evidence does state as follows:

I.

Any and all evidence in the possession of the State which it seeks to use against the defendant in this case was seized incidental to the use of all substantial and procedural safeguards to which the defendant is entitled under the laws of the Constitution of the United States and the State of Louisiana.

WHEREFORE, the State prays that after due proceedings had the Motion to Suppress the Evidence filed by the defendant herein be denied.

/s/ CHARLES C. FOTI, JR.
CHARLES C. FOTI, JR.
Assistant District Attorney
Section "G"

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984, Section "G"

STATE OF LOUISIANA

vs.

FRANK JOHNSON

MOTION TO QUASH—Filed March 13, 1968

And now into this Honorable Court comes Frank Johnson, defendant herein, through undersigned counsel, and having heard the information read, and protesting that he is not guilty of the offense set out therein, moves to quash the said information, for the following reasons, to-wit:

1. That defendant was arrested on January 20, 1968 for an alleged offense of armed robbery. Defendant, being indigent, could not afford bail nor an attorney; and no official court appointment of an attorney for defendant was made until February 21, 1968—32 days after arrest. Defendant concedes that unusual circumstances enabled the undersigned attorney to begin representing defendant on February 10, 1968, but even this was 21 days after arrest. Defendant contends that this substantial delay from arrest to appointment of counsel impaired defendant's right to effective counsel in that it has caused a serious difficulty in the adequate preparation of his defense. Defendant contends that this procedure was prejudicial because the first few days subsequent to arrest are more critical for investigation and preparation of pretrial proceedings. Defendant is charged with armed robbery, the most serious non-capital felony in Louisiana, and required representation by an attorney as soon as possible after arrest, and particularly before the committing magistrate. The reason for representation at this most critical period is to protect the defendant's right to participate effectively in the fact-finding process of trial.

2. The information is defective in that the facts upon which defendant is charged was obtained either:

(a) illegally and/or;

(b) through misrepresentation and therefore defendant contends that his arrest and the search of his home and person were illegal and lacked the constitutional requirement of probable cause.

On January 20, 1968 at 5:30 a.m. Frank Johnson was forcibly arrested without a warrant in his residence by one or more of an eight man raiding squad for an alleged violation of R.S. 14:64. The New Orleans Police Department Form #153 (copy attached) indicates that Frank Johnson was notified of the reason approximately 1 hour and 40 minutes after his arrest at defendant's residence. Defendant was booked for a violation of R.S. 14:64 at 9:40 a.m. on the same day. The booking occurred 2½ hours after the police informally defendant of his arrest. During this interval of 2½ hours, defendant did not have an attorney nor did he waive his right to have an attorney present to render advice and assistance. Not only was defendant intensively interrogated during this interval of 2½ hours, but the police also transported him back to the vicinity of his residence to search for incriminating evidence.

The arrest book at the Central Lock-up (maintained pursuant to R.S. 15:228) reflects that the alleged offense was committed on January 15, 1968—five days preceding the forcible arrest and subsequent search of the defendant conducted by the police without a warrant. The arrest book also shows that the alleged basis for the arrest of Frank Johnson was that subject's photo was picked out of a "mug" book as one of the hold-up men. On January 20, 1968 defendant was subsequently booked with two additional violations of R.S. 14:64.

WHEREFORE, the said Frank Johnson prays that this Motion to Quash be maintained and that the said information as to him, and as far as he is concerned, be declared null and void, and that he be discharged therefrom.

_____

Defendant

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY
605 Carondelet Building
New Orleans, Louisiana 70130
Telephone 523-1297
Attorney for Defendant

[*Duly sworn to by Richard A. Buckley jurat omitted in printing (all in italics)*]

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202-984 Section "G"

STATE OF LOUISIANA

versus

FRANK JOHNSON

AMENDMENT TO MOTION TO SUPPRESS THE EVIDENCE—
Filed March 20, 1968

As directed by the Court at the hearing on the Motion to Suppress Evidence, March 18, 1968, the defendant, FRANK JOHNSON, through his attorney, amends his previously submitted Motion to Suppress to read as follows:

Now into this Honorable Court comes FRANK JOHNSON, defendant herein, through his undersigned counsel, and protests that he has had his constitutional rights violated as are guaranteed by the Constitutions of the United States and the State of Louisiana, in that evidence, including the pistol allegedly used by the defendant, to be used against the defendant herein has been unlawfully and illegally obtained, and that the defendant moves that this evidence be suppressed in any criminal proceeding against him for the following reasons, to-wit:

1. The evidence to be used against the defendant was not seized incidental to a valid arrest and/or search.

WHEREFORE, the defendant Frank Johnson prays that this Motion to Suppress the evidence be maintained and that the evidence sought to be used by the State of Louisiana, including any confessions or oral admissions, in this matter, or any related proceeding, be ordered suppressed in its entirety by this Honorable Court, and

that the State of Louisiana, through its authorized representative, be prohibited from making reference thereto during the trial of this matter.

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY
605 Carondelet Building
New Orleans, Louisiana 70130
Telephone 523-1297
Attorney for Defendant

5/9/68

Denied

/s/ FRANK J. SHEA
Judge, Sec. G

ORDER

Let Jim Garrison, District Attorney for the Parish of Orleans, be and he is hereby ordered to show cause on the ..... day of March, 1968 why the Motion to Suppress the Evidence should not be maintained and that the evidence sought to be used be excluded and declared inadmissible by the State as the basis of its criminal prosecution.

Judge, Section "G"
Criminal District Court
Parish of Orleans

New Orleans, Louisiana

March ....., 1968.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984, Section "G"

STATE OF LOUISIANA

vs.

FRANK JOHNSON

ANSWER TO MOTION TO QUASH—Filed May 2, 1968

Now into Court through the undersigned Assistant District Attorney comes the State of Louisiana and for answer to the defendant's Motion to Quash anaswers as follows:

I.

The State denies each and every allegation contained in Paragraphs I, II, iiA, and IIB of the defendant's Motion to Quash and calls for strict proof thereof.

WHEREFORE, the State prays that after due proceedings had the defendant's Motion to Quash be denied.

/s/ CHARLES C. FOTI, JR.
CHARLES C. FOTI, JR.
Assistant District Attorney

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

Number 202-984, Section "G"

STATE OF LOUISIANA

versus

FRANK JOHNSON

SUPPLEMENTAL AND AMENDED MOTION
IN ARREST OF JUDGMENT—

And now, after verdict against the said Frank Johnson and before sentence, comes the said Frank Johnson, through undersigned counsel, and moves the Court hear this supplemental and amended motion in arrest of judgment herein and not to pronounce the sentence herein because of manifest errors in the record of Frank Johnson, to-wit:

1. The defendant reiterates all of the allegations in the original motion in arrest of judgment as if incorporated herein.d

2. That the verdict of the jury, a 12 man jury was 9 for guilty and 3 for not guilty; that under the Constitution and laws of the United States of America, specifically the 6th and 7th Amendments, as incorporated in the due process of law clause of the 14th Amendment to the United States Constitution, this is illegal because a unanimous verdict of 12 is required.

WHEREFORE, your mover prays that after due proceedings had, his conviction be set aside.

EARL J. AMEDEE
Counsel for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984 Section "G"

STATE OF LOUISIANA

vs.

FRANK JOHNSON

BILL OF EXCEPTIONS NO. 3—Filed September 9, 1968

BE IT REMEMBERED, that before entering on the trial of this case, your defendant, by his counsel filed the following Motion to Suppress Evidence on March 5, 1968.

"State of Louisiana	:	Criminal District Court
	:	Parish of Orleans
vs.	:	State of Louisiana
Frank Johnson	:	No. 202-984 Section "G"

MOTION TO SUPPRESS EVIDENCE

NOW INTO COURT comes Frank Johnson, made defendant in the above numbered cause, through his attorney of record, Richard A. Buckley, and on showing to the Court that certain evidence was seized in the City of New Orleans, which evidence forms the basis of the charge against him in the above numbered cause, and on further showing to the Court that said evidence was seized by the New Orleans Police Department without benefit of an arrest warrant or search warrant or, the alternative, without benefit of a search warrant; that as a result of this illegal activity of the New Orleans Police Department, said evidence is not admissible, it is moved that the Honorable District Attorney for the Parish of Orleans, show cause on the day and date to be set

by this Court why this evidence in the above numbered cause should not be suppressed.

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY
Attorney for Defendant
New Orleans Legal Assistance Corp.
605 Carondelet Building
New Orleans, Louisiana 70130
523-1297

ORDER

Considering the foregoing motion to suppress evidence, in Case No. 202-984, assigned to this Section of the Court, it is ordered that the District Attorney for the Parish of Orleans, show cause on the day of , 1968, why this evidence should not be suppressed.

Judge"

That on a subsequent date of the Court on May 9, 1968, a hearing was had contradictorily with the State on the said *Motion to Suppress Evidence.*

The Court denied and overruled the *Motion to Suppress Evidence,* to which action your defendant then and there objected and reserved a Bill of Exceptions, making a part of the Bill of Exceptions, the information, the Motion to Suppress Evidence, and the entire record a part thereof and your defendant now perfects a formal Bill of Exceptions making a part of the same, the *Information,* the *Motion to Suppress Evidence,* the ruling of the Court, objection of counsel and the entire record, and first sub-

mitting the formal Bill of Exceptions to the District Attorney now tenders the same to the Court for its comment and per curiam and prays that the same be signed and sealed by the judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 14th day of April, 1969.

/s/ FRANK J. SHEA
Judge

Unsigned

Attorney for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

Number 202 984

STATE OF LOUISIANA

vs.

FRANK T. JOHNSON

PER CURIAM TO BILL OF EXCEPTION NO. 3

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

Bill of Exception No. 3 was taken to my overruling of a Motion to Suppress filed by the defendant alleging that certain evidence was seized from the defendant which forms the basis of the charge against nim. A lengthy hearing was had on the Motion to Suppress at which hearing it developed that no evidence relative to the case for which the defendant is now on trial was seized.

Additionally, the transcript will show that no evidence was offered during the trial by the State except for a photograph of the show-up at which the defendant was identified. However, the testimony on the Motion to Suppress disclosed that Officer Field, on the 18th of January, 1968, received information from a confidential informant, through his superior, Captain Newman, that the defendant, Frank Johnson, and another man were involved in an armed robbery of several truck drivers. The officer further testified that he obtained a photograph of Frank Johnson from the B of I, along with a picture of the other man mentioned by the informant, and placed them in a group and had them brought to one of the victims who was employed by Brown's Velvet Dairy. One of the victims looked through the group of pictures and identified Frank Johnson and also a photograph of the other man.

He initialed the same with the date and stated positively that Frank Johnson was the person who had held him up. This information in their possession, the officers went to the home of the defendant where they arrested him after being admitted to his house by his wife. They found the defendant under the bed and placed him under arrest.

However, since no evidence was offered in the trial, I believe, that the question of the Motion to Suppress is moot insofar as any evidence is concerned. Insofar as the arrest is concerned, I think that the officers had probable cause to arrest the defendant since (1) they had knowledge of several armed robberys that had been committed against truck drivers for Brown's Velvet Dairy (2) they had positive identification by one of the victims, of the defendant, Frank Johnson, as the person who had held him up. As such, the officers had probable cause to believe that Frank Johnson committed the robbery and the right to arrest him. Beyond that, there is nothing before this Court in the way of evidence which could formulate the basis for this Bill of Exceptions.

Respectfully submitted,

/s/ Frank J. Shea
FRANK J. SHEA
Judge, Section G

New Orleans, Louisiana
Dated this 14 day of April, 1969

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984 Section "G"

STATE OF LOUISIANA

vs.

FRANK JOHNSON

BILL OF EXCEPTION NO. 5—Filed September 9, 1968

BE IT REMEMBERED, that before entering on the trial of this case, the defendant, by his counsel, filed the following *Motion to Quash*:

"State of Louisiana	:	Criminal District Court
vs.	:	Parish of Orleans
Frank Johnson	:	No. 202-984, Section "G"

MOTION TO QUASH

AND NOW INTO THIS HONORABLE COURT comes Frank Johnson, defendant herein, through undersigned counsel, and having heard the information read, and protesting that he is not guilty of the offense set out therein, moves to quash the said information, for the following reasons, to-wit:

1. That defendant was arrested on January 20, 1968, for an alleged offense of armed robbery. Defendant, being indigent, could not afford bail nor an attorney; and no official Court appoint of an attorney for defendant was made until February 21, 1968 —32 days after arrest. Defendant concedes that unusual circumstances enabled the undersigned attorney to begin representing defendant on February 10, 1968, but even this was 21 days after arrest. Defendant contends that this substantial delay from arrest to appointment of counsel impaired defend-

ant's right to effective counsel in that it has caused a serious difficulty in the adequate preparation of his defense. Defendant contends that this procedure was prejudicial because the first few days subsequent to arrest are most critical for investigation and preparation of pre-trial proceedings. Defendant is charged with armed robbery, the most serious non-capital felony in Louisiana, a required representation by an attorney as soon as possible after arrest, and particularly before the committing magistrate. The reason for representation at this most critical period is to protect the defendant's right to participate effectively in the fact-finding process of trial.

2. The information is defective in that the facts upon which defendant is charged was obtained either:

(a) illegally and/or,

(b) through misrepresentation and therefore defendant contends that his arrest and the search of his home and person were illegal and lacked the constitutional requirement of probable cause.

On January 20, 1968 at 5:30 A.M. Frank Johnson was forcibly arrested without a warrant in his residence by one or more of an eight man raiding squad for an alleged violation of R.S. 14:64. The New Orleans Police Department Form #153 (copy attached) indicates that Frank Johnson was notified of the reason approximately 1 hour and 40 minutes after his arrest at defendant's residence. Defendant was booked for a violation of R.S. 14:64 at 9:00 A.M. on the same day. The booking occurred 2½ hours after the police informed defendant of his arrest. During this interval of 2½ hours, defendant did not have an attorney nor did he waive his right to have an attorney present to render advice and assistance. Not only was defendant intensively interrogated during this interval of 2½ hours, but the police also transported him back to the vicinity of his residence. of his residence to search for incriminating evidence.

The arrest book at the Central Lock-up (maintained pursuant to R.S. 15:228) reflects that the

alleged offense was committed on January 15, 1968 —five days preceding the forcible arrest and subsequent search of the defendant conducted by the police without a warrant. The arrest book also shows that the alleged basis for the arrest of Frank Johnson was the subject's photo was picked out of a "mug" book as one of the hold-up men. On January 20, 1968 defendant was subsequently booked with two additional violations of R.S. 14:64.

WHEREFORE, the said Frank Johnson prays that this Motion to Quash be maintained and that the said information as to him, and as far as he is concerned, be declared null and void, and that he be discharged therefrom:

_____

Defendant

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY
Attorney for Defendant
605 Carondelet Building
New Orleans, Louisiana
522-1297

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared RICHARD A. BUCKLEY, who, after being by me duly sworn, did depose and state:

That he is the attorney for defendant, Frank Johnson, that he has read the foregoing Motion to Quash and that all of the allegations contained there-

in are true and correct, to the best of his information knowledge and belief.

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY

Sworn to and subscribed before
me this 12th day of March, 1968.

/s/ JOHN S. SUTHERLIN, JR.
Notary Public"

That on a subsequent date of the Court, a hearing was had contradictorily with the State on the said *Motion to Quash.* That the Court overruled and denied said Motion to Quash to which ruling your defendant then and there reserved a Bill of Exceptions, making a part of the Bill of Exceptions, the information, the Motion to Quash, the ruling of the Court, the objection of counsel and the entire record a part thereof and defendant, Frank Johnson, now perfects this formal Bill of Exceptions and having submitted it to the District Attorney, now tenders the same to the Court for its comment and per curiam and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided which is done accordingly this 14th day of April, 1969.

/s/ FRANK J. SHEA
Judge

/s/ EARL J. AMEDEE
Attorney for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

Number 202 984

STATE OF LOUISIANA

vs.

FRANK T. JOHNSON

PER CURIAM TO BILL OF EXCEPTION NO. 5

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

Bill of Exception No. 5 was taken to my overruling of the only Motion to Quash filed by the defendant, which complains that the delay in time between the arrest of the defendant and the appointment of an attorney for the defendant impaired the defendant's right to effective counsel. This Motion goes on to make statements of fact which are not substantiated by the credible evidence and testimony adduced on both the pleadings and on the trial of this case. The defendant, while being arrested without a warrant, was not "forcibly" arrested in the sense intimated by counsel but, as stated heretofore, by the officers after being admitted to the house by the defendant's wife.

Defense counsel further states that the defendant was not notified of the reason for his arrest until one hour and forty minutes after his arrest. This is contradicted by all of the credible evidence in the case in that the officers testified that upon finding the defendant, they placed him under arrest, informed him that he was under arrest for the crime of armed robbery and immediately advised him of all of his constitutional rights, both under the State of Louisiana and the Constitution of the United States, and under the Miranda decision. At this time all of his rights were ennumerated to him.

The Motion goes on to attack the method of arrest without a warrant. As I stated previously in other Per Curiams, I believe that the police had probable cause to make the arrest of the defendant, who was identified as someone who had robbed another person while armed with a dangerous weapon. I think it was reasonable for them to effect the arrest of this defendant as soon as possible and I do not think that the law required that they obtain a warrant since they did have probable cause as stated before to arrest this defendant for the commission of a forcible felony.

In the Motion counsel also makes an erroneous allegation of fact in that he said, "no official court appointed an attorney for the defendant until February 21, 1968." The record of this case and of your Honorable Court in proceedings No. 49 102 belies this fact since it shows, first that on February 20, 1968, this Court unanimously denied a Petition filed by the defendant through his present counsel for Writ of Mandamus and Habeas Corpus. The record further shows that as early as February 10th the same counsel who makes this allegation filed a Writ of Habeas Corpus which was alloted to the section of Judge Thomas Brahney and heard by him. This again belies the statement of counsel that the defendant had no adequate representation before February 21, 1968.

The record further shows that on January 22, 1968, the defendant appeared before the Honorable Bernard J. Bagert, Judge of Section H of the criminal district court, who was at that time sitting as committing magistrate. Testimony taken on the Motion to Quash by Judge Bagert indicates that he advised the defendant of all of his rights and also advised him that if he did not have counsel, that counsel would be appointed to represent him.

The testimony of both Judge Bagert and his Minute Clerk indicates that the defendant waived the right to a preliminary hearing. However, since counsel was representing the defendant on February 10, 1968, and the Bill of Information was not filed in this case until February 14, 1968, some seven days before ultimate counsel was appointed, counsel knew that under the law the defendant had an absolute right to a preliminary hearing

at that time and it was incumbent upon him in the representation of his client, if he thought it was necessary, to request a preliminary hearing at which time testimony could have been perpetuated.

He could not be dilatory in this respect and then complain to the Court that the defendant's rights were violated since any delay in the ascertaining of evidence or testimony to aid in his defense was occasioned by him and not by any Court.

Further, as the Court will see in a later Bill, there was a supplemental Motion to Suppress filed with respect to an oral confession made by the defendant. On that Motion it was testified that the defendant was advised of his rights on two occasions: first, at the time of his arrest and, secondly, in the detective bureau, and that the defendant was not beaten, threatened or made any promises by any officers at any time from the time of his arrest until the time that he was booked and placed in Central-Lockup.

However, again this question becomes moot since no statement alleged to have been made by the defendant was ever offered in evidence by the State. For this reason, I overruled the Motion to Quash.

Respectfully submitted,

/s/ Frank J. Shea
FRANK J. SHEA
Judge, Section G

New Orleans, Louisiana

Dated this 14th day of April, 1969.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984 Section "G"

STATE OF LOUISIANA

vs.

FRANK JOHNSON

BILL OF EXCEPTIONS NO. 7—Filed September 9, 1968

BE IT REMEMBERED, that before entering on the trial of this case, your defendant, by his counsel filed the following Amendment to Motion to Suppress Evidence:

"State of Louisiana	:	Criminal District Court
	:	Parish of Orleans
vs.	:	State of Louisiana
Frank Johnson	:	No. 202-984 Section "G"

AMENDMENT TO MOTION TO
SUPPRESS THE EVIDENCE

As directed by the Court at the hearing on the Motion to Suppress Evidence, March 18, 1968, the defendant, Frank Johnson, through his attorney amends his previously submitted Motion to Suppress to read as follows:

NOW INTO THIS HONORABLE COURT comes Frank Johnson, the defendant herein, through his undersigned counsel and protests that he has had his constitutional rights violated as are guaranteed by the Constitutions of the United States and the State of Louisiana, in that evidence, including the pistol allegedly used by the defendant, to be used again the defendant herein has been unlawfully and illegally obtained, and that the defendant moves that this evidence be suppressed in any criminal proceeding against him for the following reasons, to-wit:

1. The evidence to be used against the defendant was not seized incidental to a valid arrest and/or search.

WHEREFORE, the defendant, Frank Johnson, prays that this Motion to Suppress the Evidence be maintained and that the evidence sought to be used by the State of Louisiana, including any confessions or oral admissions, in this matter, or any related proceeding, be ordered suppressed in its entirety by this Honorable Court, and that the State of Louisiana, through its authorized representative, be prohibited from making reference thereto during the trial of this matter.

RICHARD A. BUCKLEY
Attorney for Defendant
605 Carondelet Building
New Orleans, Louisiana 70130
523-1297

ORDER

Let Jim Garrison, District Attorney for the Parish of Orleans, be and he is hereby ordered to show cause on the day of March, 1968 why the Motion to Suppress the Evidence should not be maintained and that the evidence sought to be used be excluded and declared inadmissible by the State as the basis of its criminal prosecution.

Judge, Section "G"
Criminal District Court
Parish of Orleans

New Orleans, Louisiana

March , 1968."

That on a subsequent date of the Court on May 9, 1968, a hearing was had contradictorily with the State on the said *Amendment to Motion to Suppress Evidence.*

The Court denied and overruled the *Amendment to Motion* to Suppress Evidence, to which action your defendant then and there objected and reserved a Bill of Exceptions, making a part of the Bill of Exceptions, the information, Motion to Suppress Evidence, and the Amendment to the Motion to Suppress Evidence and the entire record a part thereof and your defendant now perfects a formal Bill of Exceptions making a part of the same the Information, the Motion to Suppress Evidence and the Amendment to Motion to Suppress Evidence, the ruling of the Court, objection of counsel and the entire record, and first submitting the formal Bill of Exceptions to the District Attorney, now tenders the same to the Court for its comment and per curiam and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 14th day of April, 1969.

/s/ FRANK J. SHEA
Judge

Unsigned

Attorney for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202 984

STATE OF LOUISIANA

vs.

FRANK T. JOHNSON

PER CURIAM TO BILL OF EXCEPTION NO. 7

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

Bill of Exception No. 7 was taken to an amended motion to suppress the evidence on the ground that the evidence was not seized incidental to a valid arrest or search, and further objected to any statements made by the defendant being introduced in evidence. For the reasons assigned in the previous Per Curiam, I felt that the State had met the test of both the free and voluntary nature of the statement as well as the test that the defendant's rights had been adequately protected under the State and Federal constitutions and under the Miranda decision and that he had been adequately warned of all of his rights.

However, again this question appears to be moot since the State offered no statement made by the defendant at any time during the trial of this case.

Respectfully submitted,

/s/ FRANK J. SHEA
FRANK J. SHEA
Judge, Section G

New Orleans, Louisiana

Dated this 14th day of April, 1969.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984 Section "G"

STATE OF LOUISIANA

vs.

FRANK JOHNSON

BILL OF EXCEPTIONS No. 24—Filed September 9, 1968

BE IT REMEMBERED, that on a day subsequent to the trial of this matter, and before sentence, defendant, Frank Johnson, through his undersigned counsel, filed the following Motion in Arrest of Judgment and Supplemental and Amended Motion in Arrest of Judgment:

* * * *

"State of Louisiana	:	Criminal District Court
vs.	:	Parish of Orleans
Frank Johnson	:	No. 202-984 Section "G"

SUPPLEMENTAL AND AMENDED MOTION IN ARREST OF JUDGMENT

AND NOW, after verdict against the said Frank Johnson and before sentence, comes the said Frank Johnson, through undersigned counsel, and moves the Court hear this Supplemental and Amended Motion In Arrest of Judgment herein and not to pronounce the sentence herein because of manifest errors in the record of Frank Johnson, to-wit:

1. The defendant reiterates all of the allegations in the original Motion in Arrest of Judgment as if incorporated herein.

2. That the verdict of the jury, a 12-man jury, was 9 for guilty and 3 for not guilty; that under the constitution and laws of the United States of

America, specifically the 6th and 7th Amendments, as incorporated in the due process of law clause of the 14th Amendment to the United States Constitution, this is illegal because a unanimous verdict of 12 is required.

WHEREFORE, your mover prays that after due proceedings had, his conviction be set aside.

EARL J. AMEDEE
Counsel for Defendant

ORDER

Let the District Attorney for the Parish of Orleans be and he is hereby ordered to show cause on the day of , 1968, why this Supplemental and Amended Motion in Arrest of Judgment should not be granted.

Judge

New Orleans, Louisiana
, 1968."

And after said Motion in *Arrest of Judgment* and said *Supplemental and Amended Motion in Arrest of Judgment* were filed and after hearing argument by counsel for the State and the defense, the Court denied the Motions to which ruling, counsel for the defendant, Frank Johnson, objected in open Court and reserved a formal Bill of Exceptions, making a part thereof the entire record of the case, the Motion in Arrest of Judgment, the Supplemental and Amended Motion in Arrest of Judg-

ment, the ruling of the Court denying said Motions and objection of defense counsel a part thereof.

And first submitting this his formal Bill of Exceptions to the District Attorney, defendant, Frank Johnson, now tenders the same to the Court for its comments and per curiam and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly, this 14th day of April, 1969.

/s/ FRANK J. SHEA
Judge

/s/ EARL J. AMEDEE
Attorney for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202 984

STATE OF LOUISIANA

vs.

FRANK T. JOHNSON

PER CURIAM TO BILL OF EXCEPTION NO. 24

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

Bill of Exception No. 24 was taken to the denial of the Motion in Arrest of Judgment and supplemental Motion in Arrest of Judgment.

Paragraph one of the motion merely reiterates all that was raised on the Motion to Quash with respect to the right of counsel at all stages of the proceedings. Althought this has been previously covered in another per curiam, I feel that the defendant's rights were adequately protected from the time of his arrest until the time of his appearance in court for arraignment. Since there was no evidence offered which was alleged to have been seized from the defendant and since there was no inculpatory statement or admission offered in evidence alleging to have been made by the defendant, the most critical state of the proceeding against this defendant was that of the Show-up. The evidence produced on the Motion to Suppress and by a witness called by the defense, Mr. Byron Legendre, is uncontradicted and established conclusively that at the time that the defendant was identified at the Show-up, he was represented by most competent counsel with several years experience as chief counsel for the Legal Aid Bureau and whose testi-

mony established that the Show-up conducted by the police department was fair and conducted under the guide lines and decisions of both this Honorable Court and the Supreme Court of the United States.

There has been no showing or offer of any testimony to show how the defendant was prejudiced in the preparation of his defense in this case.

Paragraph 2 makes reference to exculpatory statements. Again, this is redundant and moot since no such statements were offered in evidence

Paragraph 3 merely is a legal prayer by counsel for the defendant for me to overturn the verdict of the jury whom, I believe, were justified in returning a verdict of guilty as charged against the defendant since, in my opinion, the State had proved the defendant's guilt beyond a reasonable doubt.

Respectfully submitted,

/s/ Frank J. Shea
FRANK J. SHEA
Judge, Section G

New Orleans, Louisiana

Dated this 14 day of April, 1969.

IN AND FOR THE CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202-984

STATE OF LOUISIANA

vs.

FRANK JOHNSON

Testimony and evidence adduced during the hearing on the motion to Quash and motion to suppress evidence in the above entitled cause on Monday, March 18, 1968, before the HONORABLE FRANK J. SHEA.

APPEARANCES:

CHARLES C. FOTI, JR., ESQ.
State of Louisiana

RICHARD A. BUCKLEY
Attorney for Defendant

REPORTED BY:

EDWARD B. SMITH
Official Court Reporter

* * * *

[fol. 3] FRANK T. JOHNSON, after having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. BUCKLEY:

Q Would you please state your name for the record?
A Frank Thomas Johnson.
Q And on the morning of January 20th, 1968, where were you residing?
A 2135 Philip Street.
Q And is that in the city of New Orleans?
A Yes, sir.

Q Would you explain to the Court what happened on the morning of January 20th, 1968, approximately five A.M. on that morning?

A Well, it was a lot of knocking on the door and I got up and I went to the door and I opened the door and they said, "This is the police." And so I let them in.

So at the time my wife got up because my nephew and my youngest son were crying in the third room, so the police officers came in and they asked me, they said—

Q May I interrupt you a minute, Mr. Johnson: Did you yourself go to the door or did someone else in the house go to the door?

[fol. 4] A No, there was a friend of mine there. He opened the door.

Q What is his name?

A Harold Hayes.

Q He opened the door?

A Yes, sir.

Q Approximately what time of the morning was this?

A I'd say about 5 o'clock.

Q 5 A.M.

A Yes, sir.

Q What were you doing at the time that you heard this knock on the door?

A Well, I was sleeping.

Q You were asleep?

A Yes, sir. And I heard it.

Q Were all of the occupants in your home asleep at that house?

A Yes.

BY MR. FOTI:

I am going to ask that he refrain from leading the witness.

BY THE COURT:

Proceed.

EXAMINATION BY MR. BUCKLEY:

Q Mr. Johnson, at any time after the police entered [fol. 5] your home, were you—by the way, how many police officers did you see enter your home that morning?

A I'd say about eight.
Q Eight police officers?
A Yes, sir.
Q Were they uniformed or not uniformed?
A No, they weren't uniformed. They were in detective clothes, you know, plain clothes men.
Q At any time after they entered, did they show you an arrest warrant?
A No, sir.
Q Did at any time after they entered, did they show you a search warrant?
A No, sir.
Q What was the first thing they did to you?

BY MR. FOTI:

Your Honor, I am going to have to ask that he refrain from leading his witness. Now, this is his witness; he is testifying.

BY THE COURT:

I know, but how else are we going to find out if he doesn't ask him what the police did?

BY THE WITNESS:

Well, they came in and they brought a picture.
[fol. 6] Q May I interrupt you again: Were they armed?
A Yes, sir; they were armed.
Q With what type of weapons?
A Shotguns.
Q Did they have shotguns pointed at anyone?
A Yes, sir, they had them pointed at me.
Q Did they at any time handcuff you?
A Yes, sir; they handcuffed me.

BY THE COURT:

I think you are getting into possibly an irrelevant area. We have to determine whether his arrest was legal and the subsequent questioning or any seizure of evidence was incidental or a follow-up of this arrest. Let's just try to confine it.

BY MR. BUCKLEY:

I was just trying to lay the ground also for any statements that might have been made and under what conditions they were made.

BY THE COURT:

All right. Go ahead.

EXAMINATION BY MR. BUCKLEY:

Q At the time they handcuffed you, did they tell you what they were doing in your home?

A Well, they asked me—no, they didn't say what [fol. 7] they were doing there.

Q Did they conduct a search of your home?

A Yes, sir, they did.

Q And in what areas did they search of your home?

A Well, they went in the first room and turned the mattress up on the bed and into the second room and that is when they woke my wife up and the kids started crying and they went into the third room, which was the room where two smaller kids were and my oldest son. And my oldest son was sleeping in the front room. He is about eighteen months old. And they all woke up and started crying.

Q Did the officer ask you any questions?

A Yes, sir.

Q What was the first question the officer asked you?

A After he handcuffed me, he showed me a picture and asked me if that was my picture.

Q What type of picture was this?

A It was a photo of me; I guess, it was about four years old and wearing an Ivy League haircut at the time.

And so I told him, "Yes, that was me." And he said, [fol. 8] "What is your name?" And I told him again, "Frank Johnson." So after handcuffing me, he asked me, he said, "Where is the pistol?" And I said, "Pistol?" and I said, "What pistol?" And he looked at me and that is when they began to search.

Q And at what point did the officer inform you that you were under arrest: Was it before or after the search?

A After the search.

Q Did he indicate specifically what you were being arrested for?

A Yes, sir, after that.

Q Did he tell you?

A After they made the search and he made my wife put my clothes on me.

Q Did the officer tell you what specific charge you were going to be charged with?

A Yes, sir.

Q And what was that?

A He said that, "You are under arrest for armed robbery."

Q Is that all: He didn't specify what date this armed robbery occurred or anything?

A No, not there.

[fol. 9] Q After the officers finished there search and had arrested you, did they take you from your home?

A Yes, sir.

Q Where did they proceed with you?

A They proceeded with me over to this court house building and the Detective Bureau of Armed Robbery.

Q This court house right here?

A Yes, sir.

Q About what time was this?

A I'd say it was a quarter to six.

Q Had they at that time informed you of your rights pertaining to counsel, rights that you did not have to say anything?

A No, sir.

Q What occurred while you were in the Detective Bureau on the morning of January 20th, 1968: Did they question you?

A Yes, sir; they questioned me concerning this supposed armed robbery that I allegedly committed and they questioned me at length about various other individuals whose pictures they brought to me to see, and I told them [fol. 10] I didn't know anything about any of that.

Q Did the officers that were questioning you—by the way, do you know the name of the officer who was questioning you? Was it Detective Lanza (phonetically spelled)?

A Yes, it was one of them.
Q Did the officer threaten you at all?
A Yes, sir; not verbally.
Q How did the officer threaten you?
A With their fists. They punched me a few times and then they got a board.

BY THE COURT:

Before we get to all of this, I think we better establish whether or not we have a statement because if he made no statement, all of this is irrelevant insofar as the motion to suppress is concerned, except insofar as any physically evidence.

BY MR. BUCKLEY:

No, I want to carry this through chronologically because there are other points that I want to show that any evidence they secured is inadmissible from the time of the initial forcible entry into his home, his arrest, the time the brought him to the Detective Bureau, out of the De- [fol. 11] tective Bureau back into the streets again, back to the Detective Bureau and finally four hours later, booked over at central lockup.

BY THE COURT:

Finish from where you said the police hit you.

BY THE WITNESS:

So that is when they—they stopped and they took me back downstairs again and said that they was going to pick up Harold Hayes. So they asked me do I know him.

EXAMINATION BY MR. BUCKLEY:

Q Did they ask you if you knew Harold Hayes?
A Yes, sir.

BY THE COURT:

Isn't Harold Hayes the man that answered the front door?

BY THE WITNESS:

Yes, sir, he is.

EXAMINATION BY MR. BUCKLEY:

Q How did they find out that that was Harold Hayes?
A Through a picture that two other detectives had.
Q Were these the pictures that they were displaying to you, showing to you?
A Yes, sir.
Q What was their remarks at that time?
[fol. 12] A When they saw the picture of Harold Hayes? Well, let's see, I don't think I could quote them word for word but they said something to the effect, "Isn't that the one that claims he was your brother?" And I said, "I don't know if he claims he was my brother," but that is Harold Hayes.
Q And after your questioning was finished, where did the officers take you then?

BY MR. FOTI:

Your Honor, at this time the State is going to have to ask that: He is alleging in his motion one that there was evidence picked up. This man has never said any statement that anything has been picked up.

BY THE COURT:

No, he is not going forward now. As far as I know, they left the Detective Bureau. Where did they go from there?

BY THE WITNESS:

We went back to my house to see if Hayes was there and he wasn't. They went in and they ran all through the back and around the corner and, you know, in the vicinity to see if he was there figuring that he might have [fol. 13] run or something, but he wasn't there. They just knocked on the door and went in. My old lady opened the door and they just ran through the house.
Q Did they ever take anything from your home to your knowledge?

A Yes, sir: A box of my brother's. It was on the mantel piece with some things of his.

Q It was on the mantel piece. What types of box was this?

A It was a baby shoe box for my baby boy, like what his shoes was in. It was in that.

Q Did he give your wife a receipt for this?

A No, sir.

Q Did they give you a receipt for this?

A No, sir.

BY THE COURT:

What was in the box?

BY THE WITNESS:

A syringe, hose syringe and a needle. We had been using it for gonorrhea.

BY THE COURT:

All right. Go ahead Mr. Buckley.

EXAMINATION BY MR. BUCKLEY:

Q After they returned to your home the second time, [fol. 14] where did they take you next?

A Well, they took me, they went around and was taking me to Harold Hayes's house, but we stopped at Melpomene and Simon Bolivar and we stopped for the light. When the light turned green, we crossed and at that point they observed—I didn't know if it was him—but they observed a male walking reading a paper, but he had the paper up over his face, you know. So they pulled, they was driving yet, and then they passed him.

Well, they was on the downtown side of Melpomene and the individual was on the uptown side of Melpomene. So they passed him up and they relayed back to a car behind that there was a male coming towards them that looked like the individual they were looking for, supposedly, to be Harold Hayes. So at that point we made a big turn and came back out Melpomene.

Q Did they ever ask you whether that man that they were now after was Harold Hayes?

A No, sir.

Q Did any of the officers ask you that?

[fol. 15] A No, sir. Well, I couldn't see his face because the paper was in front of his face.

Q And did they finally get back to that man?

A Yes, sir.

Q Did they ask you then whether that man was Harold Hayes?

A Yes, sir.

Q Did you tell them?

A Yes, sir; I told them yes. He told them his name was Harold Hayes because they questioned him by the time we got back down there.

Q Did you see them search Harold Hayes?

A No, I didn't see them search him.

Q At that time after they had picked up Harold Hayes, did they return now to the Detective Bureau?

A Yes, sir.

Q Could you tell the Court what happened upon your return to the Detective Bureau?

A Well, they took him to a room and I sat out in the front.

Q Did they question you any further?

A No, they didn't question me any further.

Q Did they then come in to ask you if you wanted to [fol. 16] make any statements?

A Yes, sir. About twenty, twenty-five minutes later they came into me and they read off of a piece of paper something to the fact pertaining to the fact that they advised me of my rights, and I told them I didn't want to make any statements; I didn't have anything to say.

Q Did you sign such a piece of paper, an arrestee form, or anything like that?

A Yes, I signed the form that they had, notified me of my rights as an arrestee.

Q Did you sign any other statement?

A No, sir.

Q This was approximately 7 A.M. in the morning?

A Yes.

Q When they informed you of your rights?
A About seven, 7:05 A.M.
Q What occurred between 7 A.M. and the time they finally booked you at central lockup at 9:40 A. M. that morning?
A Well, they left with Hayes and—

BY THE COURT:

Unless he made a statement, it is really irrelevant.

[fol. 17] BY MR. BUCKLEY:

I want to show, your Honor, why they are not proceeding under our statutes or under our code.

BY THE COURT:

Unless he made a statement, what right was he deprived of by the slow booking?

BY MR. BUCKLEY:

The right to be promptly booked. I consider them still using him as an investigative tool to find evidence against him.

BY THE COURT:

Unless he was telling them where to find him I don't know what kind of a tool he was for them.

EXAMINATION BY MR. BUCKLEY:

Q What happened at the Detective Bureau after that?
A Well, they left with Hayes and it was approximately —I could only approximate—I couldn't definitely state so I don't think I'd say exactly when but they come back with Hayes and I think he had his arm wrapped up or something, and at that time they got us both together and they brought us over to central lockup and booked us with armed robbery.
Q Did they subsequently book you again that same [fol. 18] day?
A Yes, sir; about four and a half, about five hours later on that evening they came back. They came up-

stairs and brought us back downstairs and they rebooked us with another armed robbery, and about fifteen minutes later, maybe ten, they rebooked us with another armed robbery.

Q Did you subsequently appear before a committing magistrate on January 22nd, Monday?

A Yes, sir.

Q At that time did you have an attorney assigned to you?

A No, sir.

Q At that time did the Court explain to you the rights to have a preliminary examination?

A No, sir; they just set my bond. He set the bond at $50,000.00 on each charge.

BY THE COURT:

You mean he didn't inform you of your rights that you had a right to a lawyer and you didn't have to say anything and that you could have a preliminary hearing?

BY THE WITNESS:

The only thing he said was: He asked me, "Did I [fol. 19] have a lawyer?" And I told him, "No." He asked me: "Did I think I could afford one?" And I said I didn't want one.

BY THE COURT:

All right. Proceed.

EXAMINATION BY MR. BUCKLEY:

Q But to your knowledge there was nothing said about your right to preliminary examination?

A No, sir. I thought that would be mandatory.

BY THE COURT:

Who told you that?

BY THE WITNESS:

No one.

EXAMINATION BY MR. BUCKLEY:

Q All right. To your knowledge, have you ever been booked with a robbery of Eugene Frischhertz?

A No, sir.

BY THE COURT:

When you are saying no, what do you mean: You haven't been or you don't know who you are booked with robbing?

BY THE WITNESS:

I was booked with three counts of armed robbery: [fol. 20] Two on Marion Cattalana and one on another gentlemen who worked for the same company.

Q Lester Messa (phonetically spelled)?

A Lester Messa; right, sir.

BY MR. BUCKLEY:

Your Honor, at this time I tender the witness.

BY THE COURT:

Let me ask you something so we understand one another: You never did tell these police anything about any admission or anything about taking part in any of these robberies; you never did say anything to implicate yourself in either of these three robberies that you just told us about, or robbing anybody?

BY THE WITNESS:

A No, sir.

BY THE COURT:

During the whole time from the time the police arrested you at your house until this moment?

BY THE WITNESS:

No, sir.

BY THE COURT:

You never have admitted anything about any robbery or admitted taking part in any robbery or admitted hav-

[fol. 21] ing any of the loot from any robbery; you never made any statement about anything like that?

BY THE WITNESS:

No, sir.

BY THE COURT:

Then there is no statement to suppress.

BY MR. BUCKLEY:

Your Honor, I don't know whether—could I approach the Bench?

BY THE COURT:

Take your witness on cross examination

CROSS EXAMINATION

BY MR. FOTI:

Q What day was it that the police arrested you?
A Twentieth of January, 1968.
Q And approximately what time?
A I'd say about five twenty, five twenty-five.
Q What were you doing when they came in?
A I was just getting up off of the bed.
Q And then what did the officers do?
A They asked me if—they was questioning the other individual, Hayes, at that time.
Q Did they ask you if your name was Frank Johnson?
A Yes, sir; they did.
[fol. 22] Q And then they told you you were under arrest?
A No, sir. They asked me to, showed me a photo and asked me was that my photo. I took the photo from them and I told them, "Yes," that it was.
Q And they then told you you were under arrest?
A Well, no; they put the handcuffs on me.
Q What did you say when they put the handcuffs on you?
A I asked them what was this.

Q And what did the officers say?
A They said, "Where is the pistol at?"
Q What else did you say after that?
A I asked them what pistol.
Q And what did the officers say?
A Two of the other officers turned the mattress over in the front.
Q Well, the officers never answered your question?
A No, sir; they didn't.
Q They never advised you that you were under arrest for armed robbery?
A No, sir.
Q They just handcuffed you?
A Yes, sir.
Q Did they read your rights?
[fol. 23] A No, sir.
Q Did you make any statements?
A No, sir.
Q You made no statements at your house?
A No, sir.
Q You made no statements at the Detective Bureau?
A No, sir.
Q Did you make any statements the second time you went to the Detective Bureau?
A No, sir.
Q Did you make statements in the police car?
A No, sir.
Q Did you make statements in central lockup?
A No, sir.
Q At no time did you make a statement?
A At no time did I make any statements.

BY THE COURT:

Did they ever take a gun from your house or from your person?

BY THE WITNESS:

No, sir.

BY THE COURT:

Or in your presence find a gun?

BY THE WITNESS:

No, sir.

[fol. 24] EXAMINATION BY MR. FOTI:

Q Did you ever go to a lineup?
A Yes, sir.
Q What day was this?
A Tuesday. Saturday was the twenty second; I think it was the twenty-third. That was the twenty-third.
Q Did you have an attorney?
A Yes, sir.
Q Who was your attorney?
A I think it was Mr. Legandre.
Q From legal aid?
A Yes, sir.
Q He represented you at the lineup?
A Yes, sir.
Q Did he talk to you before the lineup?
A Yes, sir.
Q Did he advise you of your rights?
A Yes.
Q This was on the twenty-third, January 23rd, 1968?
A Yes, sir.

BY MR. FOTI:

No further questions.

BY THE COURT:

He was present at the lineup?

[fol. 25] BY THE WITNESS:

Yes, sir.

BY THE COURT:

Talked to you before the lineup and was present during the lineup?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

All right. Step down next to your counsel.

BY MR. BUCKLEY:

Your Honor, at this time the defense requests the Court that we have made a showing, factual showing that there was an arrest and a search conducted without a warrant and the burden of showing the legality of this so called arrest and search is now upon the State.

BY THE COURT:

Well, I know one of the witnesses that we are probably going to have here, after this defendant's statement, is engaged in a murder trial right new: Judge Bagert, for one, or his minute clerk, or both. And we can't get them this morning, but what we can do here is hear whatever officers we have here this morning and get that much of the case over with. So call whatever officers you have [fol. 26] here that you intend to call, if any, and then we will have to recess the matter until we can get to Judge Bagert because he is trying a murder case that is going to take a couple of days.

* * * *

THEODORE FELD, after having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation?

A Theodore Feld, Lieutenant, New Orleans Police Department, assigned to the Detective Bureau, Robbery Division.

Q Were you so employed in the month of January, 1968?

A Yes, sir.

Q In the latter part of January and January 20th, 1968, did you have an occasion to arrest one Frank Johnson?

A Yes, sir.
Q What did you arrest him for, Officer?
A Arrested him for armed robbery.
Q And where was he arrested from?
A From his residence on, I think, it was 2135 Philip Street.
[fol. 27] Q Was this subject advised of his rights?
A He was told, he was placed under arrest for the armed robbery and he was brought back to the detective bureau where he was read the rights of arrestee form, and he didn't quite understand it so we advised him not to sign the form.
Q Did you advise him at the time you placed him under arrest that he was arrested for armed robbery?
A Yes, sir.
Q Did he make any statement at that time?
A At that time, no.
Q He was orally advised of his rights at that time?
A Yes, sir.
Q And then he was read the rights of, he was asked to sign a paper back at the Detective Bureau?
A We advised him not to sign the paper back in the Detective Bureau.
Q And why was that?
A Because he said he didn't quite fully understand it; so we told him it would be best not to sign it.
Q Did you participate when this subject was placed before a lineup?
[fol. 28] A Yes, sir.
Q Was he represented by counsel?
A Yes, sir.
Q Who represented him?
A Mr. Byron Legendre from the legal aid.
Q Was he there throughout the entire time?
A The entire lineup; yes, sir.

BY MR. FOTI:

I tender this witness.

CROSS EXAMINATION

BY MR. BUCKLEY:

Q Officer, you mentioned that the defendant made no statements at that time: What time?

A At the time at his house or anything, in the automobile, because we were looking for two subjects at the time and we found out later, after we brought him back to the Detective Bureau, that the subject—

Q Yes, I realize that, but all I want right now is your answer to: Did he make any statements—at what time did he make any statements—you mentioned he didn't make any at that time.

A Well, he was arrested and conveyed back to the Detective Bureau and in the Detective Bureau, after he [fol. 29] was read his rights of arrestee form, he admitted that we had him. After we told him what we had on him, he admitted his part in the armed robbery.

Q Didn't you state that he didn't understand his rights and you advised him not to sign it?

A We have a rights of arrestee form that we read to all of the subjects, and we asked him if he understood it and he was doubtful, so we advised him not to sign his rights.

Q Under your own regulations, your police department regulations, pertaining to that form, what is the procedure when an individual doesn't understand his rights and he doesn't sign it, what is the procedure incumbent upon the arresting officer?

BY MR. FOTI:

We are not talking about procedure here; we are talking about what actually happened.

BY THE COURT:

I am concerned about what he did.

EXAMINATION BY MR. BUCKLEY:

All right. The defendant didn't understand his rights. [fol. 30] You proceeded with the interrogation in any event?

A He was willing to talk to us, yes.
Q Even in the event he didn't understand his rights?
A Well, we couldn't do anymore than tell him, break it down in his language. I told him he didn't have to make a statement if he didn't want.
Q Was there an attorney present?

BY THE COURT:

Let him finish, Mr. Buckley.

BY THE WITNESS:

A And we told him at the time why we had arrested him: That his photograph was identified, and then he told us that we had him right.

BY THE COURT:

That is not what you were saying about breaking down his rights for him.

BY THE WITNESS:

Breaking it down in his language. I mean, as far as what the superintendent has the forms, he didn't understand it, so we just told him that if he didn't want to make a statement, it was up to him, but he told us that he would make a statement to us. It wasn't written though, he just made an oral statement.
[fol. 31] Q There was no attorney present?
A No, sir.
Q He was advised that he had a right to an attorney?
A Yes, sir.
Q Was he advised that if he could not afford an attorney that one would be provided him?
A That was read to him off of the rights of arrestee form.
Q Was he advised that anything he stated could be used against him in trial?
A Yes, sir.
Q And that he didn't have to make any statements?
A It is all on that form.
Q I am asking you.

BY THE COURT:

The way you explained it to him, did you tell him that also?

BY THE WITNESS:

Yes, sir. We told him that he didn't have to make a statement; if he couldn't have a lawyer, I mean, if he couldn't afford a lawyer, that the Court would appoint him a lawyer; and that we were going to put him in a lineup and we said we would give him a lawyer to represent him at the lineup.

[fol. 32] Q He didn't waive his right to have an attorney, right to make any statements, to your knowledge; did he waive any rights?

A No, he didn't waive any rights.

BY THE COURT:

Do you understand what he is talking about?

BY THE WITNESS:

About he wanted to make his statement without a lawyer present.

BY THE COURT:

That is what he wants to know: Did he waive his right to make a statement without a lawyer present?

BY THE WITNESS:

He told us that he'd make a statement, yes, without a lawyer being present.

EXAMINATION BY MR. BUCKLEY:

Q Did he sign anything to that effect?

A No, sir.

Q Do you understand what a "Waiver of" constitutes, lieutenant?

A A waiver is when he signs that he would make a statement without a lawyer being present and all, yes.

Q Do you know whether a person can waive his rights [fol. 33] if he doesn't understand his rights?

BY THE COURT:

That is up to me to decide, not him.

BY MR. BUCKLEY:

I was just asking him as a lieutenant in the New Orleans police department.

BY THE COURT:

That makes no difference.

EXAMINATION BY MR. BUCKLEY:

Q Were you in charge of this investigation, lieutenant?
A Yes, sir.
Q Did you have an arrest warrant when you proceeded to this home?
A No, sir.
Q Did you have a search warrant when you proceeded to this home?
A No, sir.
Q On what basis did you enter this man's home?
A On the eighteenth of January we received information from a confidential informant—I didn't receive it—my superior, Captain Newman received it from one of his informants that Frank Johnson and Hayes, Harold Hayes—

BY MR. BUCKLEY:

[fol. 34] Your Honor, this is—

BY THE COURT:

Well, it is a motion to suppress. Hearsay is admissible as a basis for him arriving at probable cause or reasonable grounds to believe a felony had been committed and can't tell whether he had reasonable grounds or probable cause without going into what information he was supplied with.

EXAMINATION BY MR. BUCKLEY:

Q All right. Continue, Lieutenant.
A Saying that these two subjects were involved in an armed robbery of truck drivers. So I sent one of the

men over to the B of I to get photographs on subjects by the name of Harold Hayes and Frank Johnson in a group and have one of the men bring it to one of the victims who was employed by the Brown's Velvet. The man looked at the pictures and identified Frank Johnson and also a photograph of Harold Hayes. He initialed the same with the date and then that gave us probable cause to arrest him. The man positively said that was the man that held him up.

[fol. 35] Q Do you have that photograph in your possession now?

A I don't have it on me, no.

Q Could you estimate when that photograph was taken: Is there any dates on there?

A No, the procedure in the B of I, if a man is arrested, the photographs are taken, a new photograph is taken every five years, and if a man changes in any way, any characteristics, anything, the photograph is taken. If he is finger printed and mugged today and next month he comes up there with a mustache, they will take another photograph of him. I can tell you that.

Q So this photograph could have been five years old at that time?

A Five years: It could have been only one month old. I couldn't tell you. I don't recall the date that they had on the mug shot.

Q Lieutenant, you weren't the one that actually was present when one of the victims identified this photograph, this mug shot was the individual that had robbed him?

A No, I wasn't.

Q Who did you receive that information from?

[fol. 36] A May I look at that report you have there, Mr. Foti? I sent Detective John Lanza to show the photographs.

Q Did Detective Lanza relate the information back to you that he received?

A Yes, sir: In report form to me, yes.

Q For what offense was this individual—when did that offense take place?

A This was an armed robbery.

Q When?

A That occurred in December. The man was a victim of three armed robberies. In December; I don't know the date.

Q In December.

A In December of '67'.

Q Did he identify him as to all of those robberies or just to one?

A I don't recall whether he identified him to all of them or not.

Q Is there a way you can refresh your memory as to this date? It is very important, your Honor.

BY THE COURT:

I don't see that it is important. If the man says it was in December and the man picked out the picture [fol. 37] in January, he picked out a picture of this defendant, what difference does it make whether it is December 20th or December 1st?

BY MR. BUCKLEY:

It was the alleged victim that picked out this photo. Was his name Marion Catalano?

BY THE WITNESS:

Yes, sir.

EXAMINATION BY MR. BUCKLEY:

Q Perhaps if I refresh your memory better, did he allege that he had an offense committed against him on January 15th?

A He had about three armed robberies. He was the victim of three armed robberies.

Q Another one on January 8th?

A That is probably the time. He is employed by Brown's Velvet. It happened around on Third Street, I think. Catalano was the man that identified the photographs.

Q Where did this alleged offense take place? The one that you are now going to proceed to this defendants

home to arrest him for: What offense are you going there to arrest him for?

A I was going to charge him with armed robbery and [fol. 38] I was going to come back to the robbery division to find out what item number and the date of the offense. I mean, I don't carry that around with me at all times.

Q You didn't know specifically what particular armed robbery you were going to arrest him for?

A I was going to arrest him positively for the armed robbery of Brown's Velvet Ice Cream truck driver.

Q Which one, when?

A I can't recall the date, but I have it in my locker.

Q You could have arrested him for any one of those in your locker?

A No, no I was going to go, Mr. Catalano being the complainant on this case, to arrest him because he was the one who identified his photograph.

Q Yes. Well, I don't think we are concerned here with what Mr. Catalano is going to identify; I want from you, Lieutenant, what you were going to arrest this defendant for?

BY THE COURT:

I think he has answered that.

[fol. 39] EXAMINATION BY MR. BUCKLEY:

Q This was on January 18th you received this information?

A I didn't receive the information. Captain Newman, Assistant Chief of the Detective Bureau, received the information.

Q When did you receive the information?

A I received the information from him right after he talked to his informant.

Q What date was that?

A On the eighteenth.

Q Was there some reason why you could not secure an arrest warrant for this defendant at that time?

A Well, when we received information on the eighteenth, I think it was kind of hard for us to find Mr.

Catalano because he was on his route, and we didn't exactly know where he was at but as far as the arrest warrant, no, there was no reason why we didn't get any.

Q And you were going to conduct a search while you made that arrest; Was that your intention?

A Incidental to the arrest?

Q Yes.

[fol. 40] A Yes.

Q Was there any reason why you didn't secure a search warrant?

A No.

Q What time did you proceed to 2135 Philip Street on January 20th?

A Approximately, a little after, about six fifteen, six thirty in the morning.

Q Was it daytime or nighttime?

A In the morning. It was still dark because during the winter time, it is dark at that time of the morning.

Q Were you aware that no search warrant can be executed during the nighttime in New Orleans, Louisiana?

A We have a warrant that can be executed at nighttime with the Judge's permission.

Q How did you gain entry to this home?

A Knocked on the front door. We were admitted by a colored female who identified herself as Mrs. Johnson and another colored male who identified himself. I forget the name, but he said his name was Johnson, but we knew it wasn't the subject who we were looking for at the time.

[fol. 41] Q Did you announce your authority and purpose when you knocked on the door?

A We told them we were looking for Frank Johnson and showed them our identification.

Q Did you announce your purpose?

A Yes, we told them we wanted to arrest Frank Johnson.

Q Did you tell them why?

A Yes.

Q Who are you relating this to?

A To the colored female who identified herself as Mrs. Johnson. She was holding a little baby in her arms.

Q How many individuals were involved in this arrest?
A How many police officers?
Q Correct.
A Six.
Q Were you all armed?
A Positively.
Q With shotguns?
A Yes, sir.
Q Did you enter the home with your shotguns?
A Yes, sir.
Q Did you enter the home with your shotgun?
A We sure did. Six of us didn't go in the home.

[fol. 42] BY THE COURT:

Don't be volunteering information; just answer the questions.

BY THE WITNESS:

Yes, sir.

EXAMINATION BY MR. BUCKLEY:

Q Did you personally arrest the defendant?
A You mean put my hands on him first to say he was arrested?

BY THE COURT:

Who told him he was under arrest?

BY THE WITNESS:

Sergeant Viguerie, when he took him from under that bed, told him he was under arrest.
Q You didn't?
A No, sir.
Q Did any one at that time inform him of his rights not to make any statements?
A I didn't because I was talking to his wife telling her that we were going to charge him.
Q To your knowledge, did anyone else in your investigative party?
A I couldn't recall.

Q Was there any search conducted?
A At the time, yes.
[fol. 43] Q What areas of the house were searched?
A The bedroom, the second room and the kitchen.
Q What was the objective of the search?
A We were looking for a nickel plated automatic.
Q Did you find such a nickel plated automatic?
A Not at his house, no.
Q Where did you find the nickel plated automatic—did you subsequently find, that morning, a nickel plated automatic?
A Yes.
Q Where.

BY MR. FOTI:

I am going to have to object.

BY THE COURT:

If it doesn't come from him—

BY MR. BUCKLEY:

It is going to be used against him.

BY THE COURT:

That doesn't make any difference. Objection sustained.

EXAMINATION BY MR. BUCKLEY:

Q Did you seize anything in that defendant's home?
A Yes, we seized some other stuff.
Q Did you give anyone a receipt for this?
A We seized, I am trying to think now what it was, [fol. 44] a little syringe and a spoon that was used with narcotics.
Q You didn't go there searching for it: The arrest was for armed robbery?
A It was, right on the mantel piece. We couldn't overlook it when we saw it.
Q It was in the open?
A It was laying on top of a little baby shoe box.
Q It was inside a shoe box?

A Open.
Q The top of the shoe box was open?
A Yes.

BY THE COURT:

That is really not going to play any part in this unless it has something to do with this robbery. He is not going to even testify about this if this case goes to trial.

BY MR. BUCKLEY:

I realize that, your Honor.

EXAMINATION BY MR. BUCKLEY:

Q By the way, was the defendant handcuffed?
A Yes, sir.
Q Immediately?
A When we took him from under the bed, we let him get dressed and then we handcuffed him.
[fol. 45] Q After the search, did you conduct the defendant to the police headquarters?
A Yes, sir.
Q About what time was this?
A About a half hour after we got to his house. Like I say, it was approximately, about, between six fifteen and six thirty when we got to his home. So we got back to the office, I guess, about a quarter to seven, approximately.
Q Did you participate in any interrogation of the defendant at that time?
A I think, if I am not mistaken, I might have read him his rights of arrested. My name should be on the back of that blue copy you have there.
Q Detective John Lanza and Sergeant Larry Vigurie.
A Vigurie.
Q But your name isn't on there.
A No, I didn't read him the rights form.
Q After the defendant was formally informed of his rights at 7:00 A.M., it says on this arrestee slip, to your knowledge, was he conducted anywhere else outside police headquarters?

A He was brought back up to his house because he [fol. 46] said the subject who we were looking for who claimed that he was Johnson's brother at the time was the other subject who we were looking for and he took us back to his house and showed us the other locations where this fellow, Hayes, may be living. In fact, we missed him and we were riding back to the detective bureau.

Q Did he volunteer to do this?

A He spotted the man three blocks on Melpomene and said: This is the subject walking along the street reading a newspaper in front of him, and he identified him from his walk.

Q Now, from the time after he was read his rights in the detective bureau, did he volunteer to go back out to identify the other subject?

A Yes, he told us he would find him for us.

Q Was he handcuffed at this time?

A Yes, sir; he was handcuffed. Now, this time he might have been handcuffed in front instead of being handcuffed in back of him.

Q About how long elapsed now from 7:00 A.M. and the time you went out to locate this other subject, how much time elapsed?

[fol. 47] A We went right back to his place, to his residence, because we doubted if the fellow would be at the residence yet. When we got there, he was gone.

Q Did you subsequently locate the other subject?

A We picked him up right, practically on Melpomene and Simon Bolivar.

Q You then returned to the detective bureau with both suspects?

A He returned in the car with me and Hayes returned in the car with four other detectives, because we had two cars.

Q You came back to the detective bureau?

A Yes, sir.

Q At this time there was additional interrogation made of this defendant?

A We charged him at that time, I think, with a couple of armed robberies.

Q You came back to the detective bureau, I thought you said.

Q Yes, sir.

Q He hadn't been charged yet in the detective bureau?

A We made out the arrestee forms and all back in the detective bureau.

Q Was he interrogated at any additional length upon [fol. 48] your return with the other suspect?

A Yes, he was interrogated.

Q And he didn't have an attorney?

A No, sir.

Q And he hadn't waived his rights according to your arrestee form?

A Not according—

BY MR. FOTI:

Your Honor, that is not his determination.

BY THE COURT:

That is for me to determine: Whether he waived his rights or not; not the officer's.

EXAMINATION BY MR. BUCKLEY:

Q Then the defendant was booked approximately 9:40 A.M. on January 20th?

A I don't exactly know the time. The time was about an hour or two after we got back to the office.

Q Do you know for what offense he was booked?

A We booked him with two or three, maybe four armed robberies at the time. I don't recall exactly which ones.

Q The initial booking?

A Catalano was the original booker and that is what we went out there to arrest him on.

Q You have stated that you were present in a lineup [fol. 49] held, I believe, on January 23rd?

A Yes, sir.

Q Was this defendant identified at that lineup?

A He was identified.

Q He was identified by one of the victims?

A Yes, sir.

Q By one of the victims that you went out to arrest him for?

A Well, when we had the lineup, we went through our files and got victims of all truck driver holdups in that location and requested them to come back to view the lineup. He was identified by one of those victims, and then that is when he was charged on this charge.

Q Do you know if the attorney, I think, you have previously mentioned that there was an attorney representing him?

A Yes, sir.

Q Do you know if he was representing everyone in the lineup or specifically this defendant?

A He was representing Johnson and Harold Hayes both charged with armed robbery.

Q This was Byron Legendre?

A Legal aid, yes.

BY MR. BUCKLEY:

That is all of the questions I have.

[fol. 50] REDIRECT EXAMINATION

BY MR. FOTI:

Q Were you present during the whole time he was questioned?

A I was in and out of the office. I couldn't tell you. No, I wasn't there all of the time he was being questioned.

Q During the time you were there, did anybody threaten the victim, I mean, the defendant?

A No, sir, not that I recall.

Q To make any statement?

A No, sir.

Q Was he beaten, kicked, punched, struck?

A Not in my presence.

Q Did you or anybody else tell him that if he made a confession or admission, that it would go easier on him?

A No, sir; no promises.

Q And any promises of inducements or rewards if he made any kind of admission?

A No, sir.

Q He was read his rights?

BY THE COURT:

We have been through that five or six times.

BY MR. FOTI:

No further uestions.

[fol. 51] BY THE COURT:

Step down; step outside; don't discuss your testimony with anyone. Do you have any other witnesses here at this time?

BY MR. FOTI:

No, your Honor.

BY THE COURT:

This matter is fixed for April 1st. The defendant is remanded and it will be recessed until April 1st.

(On April 1st, 1968, the following proceedings were had with regard to the above captioned matter).

* * * *

Transcript of the testimony and proceedings taken during the trial of the above captioned matter on Wednesday, May 15, 1968, before the HON. FRANK J. SHEA.

* * * *

[fol. 10] EUGENE FRISCHERTZ, having been duly sworn by the Minute Clerk was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation, sir?
A Eugene Frischertz, route salesman for Coca-Cola Bottling Company.
Q Were you so employed on December 26, 1967?
A I was.
MR. AMADEE: Your Honor, that is the last leading question I am going to let him get by with.

THE COURT: You better start making real objec-
[fol. 11] tions. You are talking about his interruptions. I don't want any frivolous objections here.

BY MR. FOTI:

Q Did you have an occasion on that date to be at Brown's Grocery at 2139 Third Street?
A I did.
Q Is this in the City of New Orleans?
A It is.
Q When were you there, approximately?
A Approximately three-thirty in the afternoon.
Q Would you tell the Court and the Jury what happened that day?
A Well, we had just finished making this stop at Brown's Grocery and we were getting in our truck, and we were getting ready to pull away from the curb, I saw this fellow come up, in the rear view mirror of the truck, and it looked—I didn't know his intentions at first—but as he came up to the door of the truck, he brandished this revolver and he asked for all my money.
Q How much did you give him?
A Between five and $600.00.
Q Did he then ask for anything else?
A No, he didn't.
Q This was what, the Coca-Cola money?
[fol. 12] MR. AMADEE: Object to leading, your Honor.
MR. FOTI: Who did the money belong to that he took?
THE WITNESS: He took the Coca-Cola money plus my wallet, which contained checks from the day's deliveries and my money which amounted to around $31.00.

BY MR. FOTI:

Q Do you see this person in Court today?
A I do.
Q Would you point him out, please?
A That gentleman right there (indicating).
Q Is this the same gentleman that held you up on December 26, 1967?

A It is.

Q Is this the same person you subsequently identified at a line-up?

A It is.

MR. AMADEE: Object to leading, your Honor. Let him testify.

THE COURT: The objection is sustained. Rephrase your question.

[fol. 13] BY MR. FOTI:

Q Did you attend a line-up on January 23, 0968?

A I did.

Q And at that time did you identify anyone?

A I identified that man.

MR. FOTI: At this time the State marks as S-1, a picture.

BY MR. FOTI:

Q Sir, at this time I show you an exhiibt which the State has marked S-1 and ask you if this is a picture—this represent the line-up picture that was taken on the date that you identified Frank Johnson?

A It does.

Q Can you tell me, if you can, which one of these gentlemen is Frank Johnson?

A This gentleman, Number 4 (indicating).

Q Had you ever met Frank Johnson before this day?

A I did not.

Q Had you ever seen him before?

A No, sir.

Q Would you turn over your money to him except for the gun?

A No, sir.

Q You did it involuntarily: Gave him your money against your wishes?

[fol. 14] A Right.

MR. FOTI: I tender this witness.

CROSS EXAMINATION

BY MR. AMADEE:

Q How do you pronounce your name, sir?
A Frischertz.
Q Frischertz?
A Frischertz, yes, sir.
Q Well, if I make a mistake, I am sorry because I have been trying to pronounce your name.
Now, Mr. Frischertz, going back to the date in question, what date was that that you say this happened?
A December 26, 1967.
Q December 26, 1967. And about what time did it happen?
A Three-thirty, sir, in the afternoon.
Q Who was with you: You said something about "we"?
A My two helpers were with me sitting in the truck.
Q Two helpers?
A Yes.
Q Do you know their names?
A Lionel Payton.
Q Do you know where he lives?
A I don't know offhand.
[fol. 15] Q He lives in the City of New Orleans?
A Right.
Q And you have seen him around the Court here this morning?
A Yes.
Q Is he in the witness room?
A Right.
Q And who is the other one?
A George Flagge.
Q Are these two Negroes?
A Yes, sir.
Q Well, is he out in the witness room, too?
A Yes.
Q About how old is Payton, approximately?
MR. FOTI: Your Honor, I am going to have to object because that is hearsay unless he knows from his own knowledge. Besides that, it is irrelevant.

THE COURT: Objection sustained.

MR. AMADEE: Your Honor, to the ruling of the Court on the question of the age of these two men that work with this man daily, counsel would like to reserve [fol. 16] a Bill of Exceptions making the question propounded by the defendant, the defense counsel, the objection of the State, the ruling of the Court and the entire record a part thereof.

EXAMINATION BY MR. AMADEE:

Q Now, Mr. Frischertz, you say this was around, about three-thirty p.m.?

A Yes, sir.

Q Were these two boys, your helpers, carrying anything?

A No, sir.

Q What were they doing?

A They were sitting in the truck; we were getting ready to leave the stop.

Q They were sitting in the truck and you were driving the truck?

A No, sir.

Q Who was driving?

A George Flagge.

Q Is he a driver-salesman?

A Yes, he is.

Q Do you know how long has he been one?

MR. FOTI: Your Honor, I am going to have to object to this also as it is irrelevant.

[fol. 17] THE COURT: Objection sustained.

MR. AMADEE: To the ruling of the Court, counsel would like to reserve a Bill making the question, objection and the ruling of the Court and the entire record a part thereof.

BY MR. AMADEE:

Q Now, where were you seated in the truck?

A I was sitting on the passenger side.

Q You got three of you all in the front seat?

A Yes, sir.

Q And you were nearest—
A Nearest the door.
Q What door?
A To the passenger door.
Q Which direction were you travelling in relation to the River?
A Heading toward the River.
Q That would mean that you were sitting nearest to the right door?
A Right?
Q I mean, you are calling it the passenger door, but I'd prefer calling it the right door?
A Right.
Q And George was driving?
[fol. 18] A Right.
Q And who was in the middle?
A Lionel Payton.
Q Payton was in the middle. You said something about a rear-view mirror, didn't you?
A Yes, sir.
Q Naturally George could see in the rear-view mirror, as far as you know?
A Yes, sir.
MR. FOTI: Your Honor, I am going to object, that calls for an assumption on the part of this witness.
MR. AMADEE: Your Honor, may I be heard on that?
THE COURT: Answer the question.

BY MR. AMADEE:

Q George could see in the rear-view mirror, as far as you know?
A Right.
Q And Lionel Payton could see, as far as you know?
A I don't believe so.
Q But you could see?
A Right.
Q Now, you got two rear-view mirrors?
[fol. 19] A Right.
Q Now, describe where they are insofar as the cab is concerned?

A One is on the right side and one is on the left side.
Q Are they rear-view mirrors or side rear-view mirrors?
A Alongside mirrors.
Q Outside the cars?
A Right.
Q You got two of them?
A Right.
Q Now, you said you were at what address?
A 2139 Third.
Q That is the corner?
A Yes, sir.
Q Of what two streets?
A Third and Loyola.
Q You mean Simon Bolivar or do you mean Loyola?
A Loyola.
Q That is one block from Simon Bolivar or two?
A I believe it is three blocks from Simon Bolivar.
Q Combing back to Claiborne?
A Coming back to the River.
Q Or going up to the River?
A Right.
[fol. 20] Q What had you done at the store shortly there before?
A We had made a delivery.
Q What had you delivered?
A Coca-Cola.
Q How many cases?
MR. FOTI: Your Honor, I'm going to have to object.
THE COURT: Objection sustained.
MR. FOTI: This is irrelevant.
MR. AMADEE: Same Exception, your Honor; same Bill.

BY MR. AMADEE:

Q Now, you had completed your delivery?
A I did.
Q And about what time was this?
A About three-thirty in the afternoon.
Q You had a watch?

A I assumed it was three-thirty because at the time I arrived I saw the time.

Q Did you have a watch.

THE COURT: Would you let him finish answering the question?

[fol. 21] MR. AMADEE: Pardon me.

THE WITNESS: As I went back into the grocery store to make the call for the police, I noticed the time.

Q In other words, when you got back in there it was three-thirty?

A Right.

Q Now, Mr. Frischertz, who was in the store when you got back?

MR. FOTI: Your Honor, I am going to have to object to this as this is irrelevant.

MR. AMADEE: This is res gestae. I might want to call some of these people as witnesses.

THE COURT: You better quit making speeches.

Please don't make me have to tell you that over and over again.

MR. AMADEE: He objects to everything.

THE COURT: Mr. Amadee.

[fol. 22] MR. FOTI: I have a right to object without innuendoes.

THE COURT: If you don't stop, you're just going to create an unpleasant situation.

MR. AMADEE: Judge, I am not entitled to say anything?

THE COURT: Don't keep arguing with me.

MR. AMADEE: I am not arguing; I am questioning the man.

THE COURT: You make an objection and I will rule on it. When he makes one, I will rule on it. I do not want you making speeches over and over.

MR. AMADEE: What question. You don't want—

THE COURT: Take the Jury over across the hall for a minute.

(Whereupon the Jury was sequestered.)

MR. AMADEE: Judge, could this be in chambers?

THE COURT: No, it is going to be right here.

[fol. 23] Now, listen to me, pay attention close because I am going to tell you: I just put one lawyer in jail two days ago and I didn't like to do it, you understand, but you are pushing me and you better stop pushing me right now. You start acting like a lawyer in this Courtroom and quit rambling all over the place making funny jokes and acting silly.

Now, we are going to conduct this trial like you are a lawyer, like he is a lawyer and I am a judge and it is going to stay that way, and believe what I am telling you, or you are going to make me do something unpleasant for both of us. Now, I don't want to do it, but I'm going to put up with any foolishness from you.

No, you don't open your mouth. I am tired of this silliness. This has been going on since ten o'clock. You have been cutting up like you are fifteen years old. You are a grown man and you have been a lawyer twenty years and you better act like one. And when I rule, you keep your mouth shut and take your Bill of Exceptions. [fol. 24] When he gets out of line, I am going to stop him. Don't tell me what I got to do and what I don't have to do when I tell you you can't do something. Don't do it, you understand me?

MR. AMADEE: I think I have been doing that, Judge.

THE COURT: You haven't been doing it.

MR. AMADEE: Well, I am going to do it from here on out.

THE COURT: I am going to tell you you'd better do it. I am sick of this silliness. We got a Jury case and I want this man to get all of his rights protected during this trial, but I don't want to be fooling with you with silliness when we are talking about the serious business. Now, you stop this right now.

MR. AMADEE: Your Honor, at this time I'd like to move for a mistrial.

THE COURT: Look, you'd better sit down.

MR. AMADEE: May I finish?

[fol. 25] THE COURT: There is nobody here to hear?

MR. AMADEE: No, but I would like to move for a mistrial.

THE COURT: Move for a mistrial.

MR. AMADEE: And I'd like to have a ruling.

THE COURT: Your mistrial is denied. And just believe what I am telling you.

MR. AMADEE: To the ruling of the Court on the mistrial, I want to make a formal Bill of Exceptions making all of the interruptions by the District Attorney's Office, specifically Mr. Foti; I want to make the entire record—

THE COURT: Stop laughing. This is what has got to stop. Quit laughing at him when he starts acting this way.

MR. AMADEE: I want to make the entire record and all of the testimony and what-not of this man—

[fol. 26] THE COURT: Make a legal bill, no what-not. There is no such word in this record.

MR. AMADEE: So forth then.

THE COURT: Not so forth. Specifically state what you want to be part of this Bill.

MR. AMADEE: Everything that is in this record a part of the Bill.

THE COURT: All right. Put that in the Bill.

Now, just keep in mind what I told you. You have got a man to represent here; represent him and don't fight me.

MR. AMADEE: Judge, I am not fighting you; I am fighting him.

THE COURT: No, you are not. You keep interrupting; then you keep making speeches when you know you're not supposed to. Now, pay attention to your client and quit doing all these things that I am telling you not to do.

Bring the Jury back in.

(Whereupon the Jury was brought back into the Courtroom.)

[fol. 27] CROSS EXAMINATION

BY MR. AMADEE:

Q Mr. Frischertz, what were the weather conditions of this date?

A Good.

Q It hadn't rained?

A No, sir.

Q And was the sun shining at that time?

A Yes, sir.

Q Was there a glare in the rear-view mirror so far as you know?

A No, sir.

Q The rear-view mirrors had been adjusted by you as you got in the car so you could see behind you or are they already stationarily adjusted?

A You can adjust them, but most of them are permanently adjusted.

Q Now, where did the subject you saw come from?

A He came from the rear of the truck, from the rear of the right side of the truck.

Q In other words, what you are saying is that he must have passed the door of the grocery store at 2139?

A He may have. He came from the rear of the truck. I couldn't see him in back of the truck, but he came [fol. 28] from the rear of the truck.

Q Well, how was the rear of the truck, as far as you know, in relation to the door of the grocery store?

A The truck was on the left-hand side of the street right by the grocery store.

Q Across the street from the store?

A No, it was not. It was right by the grocery store.

Q Looking at the River?

A Right.

Q Then the grocery store was on the downtown, industrial canal side of that street?

A Yes.

Q It is not on the Jefferson Parish side of that street?

A No.

Q But it was on the downtown—was it the lake side or the river side looking: In relation to the river, the late, the Industrial Canal—

A It was headed towards the River.

Q I know, but I say on the left side: I know that is the Industrial Canal side or the Canal Street side?

A Right.

Q What street was this?

A It was on the Canal Street side.

[fol. 29] Q What street?

A On Third Street.

Q Now, was it in relation to the four intersections, was it on the River side or the Lake side of that Canal Street side?

A What would you consider the River side?

Q Well, I would consider that if I walked up Third Street and you say this is Loyola, when I got to Loyola —you got that intersection—well, if the store was here (indicating): You know that?

A Are you walking towards the River?

Q I am walking towards the River and the store is like here—I haven't crossed the street—that would be the Lake side?

A Well, that is where—that is it.

Q If I walked across the street, that would be the River side?

A Well, that would be the River side if you walked across the street: That is where the truck was situated.

Q In other words, what you are saying: It was on the left, meaning Canal Street in my terminology, River side of Loyola?

A Of Third Street.

Q Of Third and Loyola, is that correct?

[fol. 30] A Right.

Q Then this store is on the corner, correct?

A Right.

Q Then the subject must have been in the middle of the street somewhat of Loyola and Third?

A The subject?

Q The armed robber, the purported armed robbery?

A Right. He was coming up Third Street from the rear of the truck.

Q Now, are you telling me that you recognized him in the mirror or you just knew it was a subject, a Negro subject?

A At first I thought it was somebody coming to tell me that somebody needed a Coke because this fellow across the street usually bought Coke. He wasn't on my route, but it was a different—

Q Who was this fellow across the street?

A The Dream Boat Lounge.

Q Do you know his name?

A I don't know his name offhand.

Q What kind of looking fellow is he?

A I'd say he is a fellow.

Q Is he black?

A No.

Q Is he brown?

A No.

[fol. 31] Q I mean, what color is he?

A He is white?

Q Well, then, this subject looked like him coming to you?

A No. I thought it was somebody that he had sent to tell me that they needed Coke over there.

Q But you don't know who the fellow was up to that particular point?

A Right.

Q There was no recollection of anybody that you knew?

A I did not recognize him as being anybody that I had known before, right.

Q Now, what happened?

A He came running up from the rear of the truck, from the right side and he brandished a gun as he got to the door of the truck where I was sitting.

Q Now, was the gun in your face?

A He was moving it like that at all three of us (indicating).

Q And you gave him the money?

A He told me, he says, "Give me all your money."

Q That is not what I asked you. Did you give him all of the money?

A I did give him the money.

Q You reached down in your pocket and took everything that you had—

[fol. 32] A I reached in my pocket and got my bills out and I gave him that; then he asked for my wallet.

Q Now, where did this subject then go?

A He ran from the truck back the same direction he came and around and back down Third Street.

Q He ran back Third Street: He ran back the direction you saw him come from?

A He ran back of the truck and he went out towards Loyola.

Q You are sure it is not Third?

A No, I am positive.

Q You were wrong when you said Third?

A I was wrong when I said Third.

Q And he disappeared?

A Right.

Q Well then what did you do?

A I jumped out of the truck and went to the rear of the truck and I saw him running away from me. He was already a block away so I went into the grocery store and called the police.

Q But his rear was in your office: I mean, running rom you, you could just see his rear from head on down?

A Right.

Q And you went back into the store?

[fol. 33] A I did.

Q Did the two Negro helpers go back in the store with you?

A They did.

Q Immediately?

A No, not immediately.

Q And what was the first thing you did when you got back into the store?

A I asked the lady where her telephone was and she let me use her telephone?

Q Did you call the police?

A I did.

Q What did you do after that?
A I sat and waited for the officers to come.
Q How long?
A I'd say it might have been ten, say fifteen minutes.
Q Now, in the meantime, while you were waiting, did you talk to anybody: Did you tell them about it, anybody about it?
A I just told the lady that I had been robbed and I'd like to call the police.
Q What is the lady's name?
A Mrs. Brown.
Q Did you see her over in the witness room? That is the store owner, huh?
A The store owner, yes.
[fol. 34] Q You told her then what happened, what you thought, what you had seen happen, correct?
A Right.
Q Was anybody else in the store at that time?
A No.
Q I mean, you say it was three-thirty, what I want to know at three-thirty on this particular time, about how many people were in the store?
A I'd say that when I went in the store to ask her to use the phone there wasn't anybody but her in the store at that time.
Q Only Mrs. Brown?
A Right.
MR. FOTI: Your Honor, I'm going to have to object. This is irrelevant: Who was in the store after the robbery.
THE COURT: He has already answered the question.
MR. AMADEE: Wnat is your ruling then?
THE COURT: He has already answered the question.
MR. AMADEE: That is correct. What is your ruling?
[fol. 35] THE COURT: That he has already answered it.

BY MR. AMADEE:

Q When the police came, what time was it, about?
A I'd say it was about a quarter to four.

Q Three-forty-five?
A Uh-huh.
Q How many came?
A One officer came out.
Q Do you know his name?
A I believe his name was Turgeau: I believe that is how you pronounce it.
Q He was a patrolman: He wasn't a lieutentant or anything like that, plain patrolman?
A Right.
Q Now, did you give him a statement?
A I did.
Q Briefly do you recall your statement to the Officer Turgeau?
A Well, I told him that I had just came out of the store and I had gotten in the truck already and we were getting ready to pull away from the curb and I saw this fellow coming up in the rear view mirror of the truck, and he came up to the door and he pulled a revolver on me and he asked me for the money. So I gave him all of the money and he asked me to describe him.
[fol. 36] Q Did you describe him?
A I described him.
Q Would you relate that description that you gave at that time?
A I said he was about five-nine, between five nine and five-ten, about 160, 165 pounds and he had—he asked me what type hair did he have.
Q Who asked you that?
A The officer.
Q He didn't let you tell, he asked you?
A He asked me if it was short hair or long hair and I told him it was short hair.
Q Go ahead. Did he ask you any more questions?
A No. He asked me what he was wearing and I told him he had a grey sweatshirt and a hood.
Q What kind of hood?
A A regular combination hood and a sweater shirt, made together.
Q Did you tell him what color it was?
A Gray.

Q Now, well, you say it was gray. Go ahead: Go on with your description.

A And I told him he had tennis shoes on and dark trousers.

Q Black?

A I just said dark; I didn't know whether they were [fol. 37] black.

Q You don't know what color they were: You weren't positive about the color?

A No, I wasn't positive about the colors.

Q What else?

A And that after—he asked me what he did after he took the money and I told him he jumped off of the truck, jumped from the truck, ran around to the back and took off down Loyola Street.

Q Did he ask you any other questions?

A Not that I can remember. He asked me how much money was taken and I told him between five and $600.00.

Q Was it a situation of you narrating to him what happened voluntarily or him interrogating you?

MR. FOTI: Your Honor, I am going to have to ask that the witness not answer this question in that it is irrelevant. I haven't objected before but I think this is irrelevant and immaterial.

THE COURT: Objection sustained.

MR. AMADEE: To the ruling of the Court, counsel [fol. 38] would like to reserve a Bill of Exceptions making the question propounded, the objection of the District Attorney and the ruling of the Court a part thereof.

EXAMINATION BY MR. AMADEE:

Q Continue the description, Mr. Frischertz.

A He asked me if it was light skin or dark skin.

Q What did you tell him?

A I told him it was dark skin.

Q What else did he ask you?

A That is all I can remember that he asked me.

Q Is it possible that he could have asked you something else?

A It is possible.

Q That you don't remember at this time?
A Right.
Q Without being faceous, Mr. Frischertz, at the time this person, whoever he was, was robbing you, you were fearful?
A At first I wasn't but after it happened, I was.
Q At first you felt like fighting?
A At first I was—right, I just, I became sort of numb, and after that—
Q I understand. I know what you are talking about. Now, what about the line-up, or was there a line-up?
A Yes. There was a line-up.
[fol. 39] Q Do you know the date of the line-up?
A As far as I know, it was the twenty-third of January.
Q Pardon me, the twenty-third of January, 1968?
A Right.
Q Now, was that the only line-up you attended?
A Right.
Q You never attended any other?
A No.
Q And where was that line-up?
A That was held—I don't know which building they call it—it was held in the new building across the way from here.
Q It was held in the new building?
A Uh-huh.
Q Where did you have to meet them for the line-up: This building, the detective office?
A Right.
Q That is on the first floor?
A I believe it is, yes, sir.
Q It is down from where the blind man sells things?
A Yes.
Q And it is pass the Sheriff's Office: You know where the Sheriff's Office is?
A It is on the first floor.
[fol. 40] MR. FOTI: He stated where it was: The detective's office.
THE COURT: Proceed.

BY MR. AMADEE:

Q Now, what I want to know is who you talked to first?

MR. FOTI: I am going to have to object: This is immaterial.

THE COURT: It is hearsay besides. Objection is sustained.

BY MR. AMADEE:

Q Who accompanied you to the line-up from the detective's office?

A I don't know the names, the officer's names. There were several other people that had gone with me but I don't know their names.

Q You mean there were several people going to the lineup at your time?

A Right.

Q Were they men or women?

A A few women and mostly men, I'd say.

Q Were they white or black?

A That is immaterial: What the color of them was. [fol. 41] THE COURT: Objection sustained.

MR. AMADEE: To the ruling of the Court, counsel would like to reserve a Bill of Exceptions making the question propounded, the objection of the District Attorney and the ruling of the Court a part thereof, and the entire record.

BY MR. AMADEE:

Q Were any subjects brought over at that time with you, other prospects, suspects?

THE COURT: Do you know what he is talking about?

THE WITNESS: Other people that have been involved, you mean?

THE COURT: No. He doesn't understand what you are talking about; clarify your question.

BY MR. AMADEE:

Q What I am saying is: Were the people who they were going to make the line-up brought along over—

A No, sir, not with us.

Q You didn't see anybody like that?

[fol. 42] A No, I didn't.

Q That is why I asked again: Were there any Negro males or Negro females—

MR. FOTI: I am going to have to object to whether they were Negro or white.

THE COURT: The objection already has been sustained on that question.

MR. AMADEE: Same exception, your Honor.

BY MR. AMADEE:

Q Your had to walk something like 300 yards to the new building?

MR. FOTI: Your Honor, I fail to see the relevancy of this.

THE COURT: Objection sustained.

MR. AMADEE: Your Honor, I'd like to reserve my Bill: Same ruling, same objection, same Exception.

BY MR. AMADEE:

Q When you got over to the new building, do you know who you first talked to?

A No, I don't know anybody's name that I talked to [fol. 43] over there.

Q Who showed you any mug shots?

A Well, we went to the line-up over there and I sat in the theater and they brought these men out there.

Q But the question was: Who showed you any mug shots?

THE COURT: You are assuming that. Ask him if he was shown any.

BY MR. AMADEE:

Q Were you showed any mug shots?

A You mean previous to the line-up?

THE COURT: How can he know when you are talking about?

THE WITNESS: No, not previous to the day of the line-up.

BY MR. AMADEE:

Q When were you shown them?
A I wasn't shown the day of the line-up: I was shown the day that I was robbed.
Q You were shown mug shots?
A Yes. I came up here and looked at some of the mug shots.
Q You never were shown any more after that?
A No, sir.
[fol. 44] Q You weren't shown any at all the day of the line-up, as you said?
A No, I wasn't.
Q Did you identify any of the mug shots?
A I did.
Q And what date was that?
MR. FOTI: I think that I'd like that question rephrased. If he is going back to the mug shots: Are you talking about mug shots or is he talking about at the line-up.
MR. PHILIP STEIN: Mug shots.
THE COURT: One counsel at a time.
MR. AMADEE: Your Honor, this is cross-examination.
THE COURT: I said one lawyer at a time.
MR. AMADEE: No, I was just telling him this is cross-examination.
THE COURT: I understand that. What time were you asking the man about, Mug shots or the line-up?
[fol. 45] MR. AMADEE: Mug shots.
THE COURT: He is asking you did you identify from the mug shots that were shown to you?
THE WITNESS: I tentatively identified—I picked out about two or three of them that looked similar.

BY MR. AMADEE:

Q Tentatively: You mean that there could have been two or three that had done it?
A No.
Q Two or three that looked like the one?
A Looked similar, right.

Q And this was how many days after it happened?
A That was the same evening.
Q That same afternoon when it was fresh in your mind: Was it fresh in your mind?
A Yes.
MR. FOTI: That calls for a conclusion.
THE COURT: He has already answered the question.
MR. AMADEE: He would know if it was fresh in his mind.
THE COURT: He has already answered the question, Mr. Amadee.
[fol. 46] MR. AMADEE: Thank you, Judge

BY MR. AMADEE:

Q When you went to the line-up, how many people besides you were sitting out there?
A I'd say about eight or nine.
Q Eight or nine. Do you know whether or not any Negros were sitting out there?
MR. FOTI: Your Honor, I am going to object to this question. This is the third time.
THE COURT: Objection sustained.
MR. AMADEE: I'd like to raise a Bill of Exceptions, I mean, save a Bill of Exceptions making the question propounded witness, the objection of the District Attorney, the ruling of the Court and the entire record a part thereof.

EXAMINATION BY MR. AMADEE:

Q How many females were sitting out there, if you know?
MR. FOTI: I am going to have to object to that: It is immaterial.
[fol. 47] THE COURT: Objection sustained.
MR. AMADEE: Same Bill; Same Exceptions.

BY MR. AMADEE:

Q How many males?
A I'd say, about, maybe, six or seven.
Q Sitting out there with you?
A Right.

Q How many of them were police officers?
A I wouldn't know.
Q Were any of them police officers?
A Sitting out there with us?
Q Yes. Aside of you: With you?
A No.
Q No police officers had accompanied you there?
A There was, I'd say, one or two of them, but they weren't sitting with us.
Q Well, let me ask you this: Tune your attention to that date, and I know it is a stretch of your memory—
MR. FOTI: Your Honor, I am going to object.
MR. AMADEE: I was just trying to lay a predicate.
[fol. 48] THE COURT: Don't make statements about his memory or anything else like that. Ask him a question.

BY MR. AMADEE:

Q There's a police officer outside. I could call him in, but I'm not going to do that to the State.
MR. FOTI: Once again if he wants to call a police officer, let him call the police officer.
THE COURT: Mr. Amadee, didn't you understand what I told you before?
MR. AMADEE: Yes, sir. And I am ready to go get him.
THE COURT: You are ready: Don't make any more statements.
MR. AMADEE: That is correct. I'm ready to go get the officer because I was trying to save time.
THE COURT: Don't save my time when it has anything to do with this man's trial.
THE COURT: If you have the person you want this witness to look at?
[fol. 49] MR. AMADEE: From the Detective Bureau who handles the line-ups.
THE COURT: Is he outside in the hall?
MR. AMADEE: I saw him.
THE COURT: If he is in the hall, fine; if he is not in the hall, we are not going to wait while you go calling some place for him.
MR. AMADEE: May I take a look, your Honor?

BY MR. AMADEE:

Q Mr. Frischertz, do you recognize that gentleman?
THE COURT: Wait a minute. Let the witness step out of the Courtroom first.

BY MR. AMADEE:

Q Did you recognize that gentleman?
A I did.
Q Did you see him on that date?
A I did.
Q Where did you see him on that date?
A He is the gentleman wthat took the statement from me.
[fol. 50] Q At the Detective Bureau?
A Right.
Q Did you see him at Central Lockup near the line-up that day?
A I am not sure whether I did or not: No.
Q Do you know whether or not he was one of the six or seven males sitting out there that day?
A No, he wasn't sitting us.
Q Is he the officer who had originally showed you the mug shots the first day?
A The day I was robbed: No.
Q Was he with the officer that showed it to you?
A No.
Q You only saw him over there when you gave him a statement?
A Yes, sir.
Q What was the statement you gave him?
MR. FOTI: Your Honor, I am going to have to object.
THE COURT: Objection sustained.
MR. AMADEE: We would like to reserve a Bill of Exceptions making the request for the statement by this gentleman on the cross-examination, the objection of the [fol. 51] State and the ruling of the Court, and the entire record a part thereof.

BY MR. AMADEE:

Q Now, let's get to the line-up, Mr. Frischertz: What happened at the line-up, tell us about it in your own words?

A I identified this man as being the man that held me up.

Q Did you identify him by a number?

A No.

Q If I showed you a picture, would it refresh your recollection: Is that the line-up?

A Yes, sir.

Q Were there a number at that date?

A There were.

Q I ask you if: Did you identify them by number?

A I did not. I identified him, then picked the humber.

Q But you did identify by numer?

A Not by number. I identified his face.

Q And then tied a number in with it?

A Right.

Q But there was always a number around his neck, correct?

A Right.

Q And that number was four?

A Right.

Q And did you identify him as to position in the line-up?

[fol. 52] A No.

Q Do you know how many persons were in the line-up: I just showed it to you?

A Seven.

Q Who was the middle man?

A The middle man?

Q Yes. Number four—three on one side and three on the other—who was the middle man?

MR. FOTI: Your Honor, I am going to have to object.

MR. AMADEE: I think this is important.

THE COURT: Objection sustained.

MR. AMADEE: Your Honor, at this time we would like to reserve a Bill of Exceptions making the question

propounded concerning the position in the line-up, this picture and the entire record a part thereof.

BY MR. AMADEE:

Q Was he one of the shorter men in the line-up?
A He was.
Q The fact of the matter is he was one of the three short men, is that correct?
A As far as I can remember.
[fol. 53] Q Isn't that correct?
THE COURT: He answered you, Mr. Amadee.

BY MR. AMADEE:

Q And these three short men were all put in the middle—you would want to see it again or do you recall?
A I don't recall.
They were all in the middle.
Q In other words, three men of approximately the same height, approximtaely the same weight and they were surrounded by two men on each side, tall, and they were in the middle, is that correct?
A Uh-huh.
Q And the defendant, Frank Johnson, was in the middle, middle, is that correct?
A Right.
Q When you saw him, you immediately recognized him, is that correct?
A I did.
Q No officer was sitting beside of you prompting you?
A No.
Q No one had made any suggestions to you at the Detective Bureau?
A No.
Q No one in Central Lockup, officer or otherwise, had [fol. 54] given you any hint?
A No.
Q As to how the line-up may be set up?
A No, sir.
Q And you didn't see the line-up made up?
A No.

Q And you don;t know who made the line-up up.
A Right.
Q Now, you are positive now that you identified three possible persons in the mug shots: You aren't positive about that?
A Right.
Q You weren't sure at the time?
A Right.
Q But at the line-up you were sure?
A I was.
Q Now, were you more sure at the line-up than you were when you had the mug shots?
A I was more sure at the line-up.
Q And were you more sure with the mug shots than when you were looking in your rear view mirror on the date of the offense?
MR. FOTI: I don't understand that.
MR. AMADEE: I understand.
[fol. 55] THE COURT: Objection sustained.
MR. AMADEE: To the ruling of the Court, counsel would like to reserve a formal Bill of Exceptions making the question propounded by defense counsel, the objection of the Assistant District Attorney and the entire record including the testimony of Mr. Frischertz a part thereof.
Your Honor, we are finished with this witness.
THE COURT: Do you have any other questions of this witness?
MR. FOTI: Just one question.

REDIRECT EXAMINATION

BY MR. FOTI:

Q Were you shown a picture of the defendant in this case on the day of the robbery when you observed the mug shots?
A No.
Q When you say you made an identification, you picked out people that were similar in built and facial characteristics, is that what you are talking about?

A Right.

[fol. 56] Q Is there any question in your mind today that this is the man that held you up on December 26th?

A There is not.

Q Was there any question in your mind on the date of the line-up that this was the man that held you up on December 26th?

A No.

MR FOTI: No further questions.

RECROSS-EXAMINATION

BY MR. AMADEE:

Q You say when you picked the mug shot, the defendant's picture was not in those three shots?

A As far as I can recollect, it was not.

Q It was not. Anybody testified to the contrary would be lying, as far as you know?

MR. FOTI: He is assuming a point of evidence that is not a fact.

THE COURT: Objection sustained.

MR. AMADEE: Well, your Honor, I will ask it another way.

THE COURT: No, you won't: The objection is sustained. You will not ask it again.

[fol. 57] MR. AMADEE: I will reserve my Bill of Exceptions making the questions propounded by defense counsel, the objection of the State and the ruling of the Court and the entire record including this witness' testimony specifically a part thereof.

I'm through with the witness, your Honor.

* * * *

RENE BELSOM, after having been first duly sworn by the Minute Clerk, did testify as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation, please?

A My name is Rene Belsom; I am a patrolman; I am employed in the Bureau of Identification.

Q How long have you been so employed?
A I have been employed for this Department for four years.
Q And what is your primary duty?
A I take photographs and test areas for finger prints.
Q Have you been qualified as an expert in photography?
A No, sir.
Q Did you have occasion on January 23, 1968, at approximately nine-seventeen in the morning to take a line-up picture?
A I did.
[fol. 58] Q I show you what the State has marked S-1 and ask you if you can identify what the State has marked as S-1?
A I took this photograph, sir.
Q And would you tell the Court how you can identify it?
A Because from the moment the picture is taken until the picture is developed and stamped, no one handles it but me.
Q What does the stamp on the back read?
A "Identification Bureau, New Orleans Police Department, Photographing Department, Date: 1/23/68, Time: 9:17 a.m., Photographer: Rene Belsom." That is my signature.
Q Did you mark on there who the Number Four man was?
A No, sir.
Q You took this picture on January 23, 1968?
A Yes, sir.
Q And you kept it in your possession all of the time?
A I brought it back and developed it and made a copy of it and stamped it and it was used in Section—
THE COURT: No, don't tell us about anything like [fol. 59] that. What did you do with the picture?
THE WITNESS: I turned it over to the District Attorney.
MR. FOTI: No further questions.
MR. AMADEE: What section are you talking about?

MR. FOTI: Your Honor, I am going to object.

THE COURT: Objection sustained.

MR. AMADEE: Your Honor, I am going to move for a mistrial. This man has alluded to another section. Unless it is something not about my client, I am going to have to move for a mistrial.

THE COURT: Motion for mistrial is denied.

MR. AMADEE: At which time counsel for the defendant would like to reserve a formal Bill of Exception making this picture, making the testimony of the witness, making his attempted allusion to another section, making my attempt to elicit it from him and the ruling [fol. 60] of the Court and the entire record a part thereof.

THE COURT: Disregard that word "section:" It has no meaning in this trial whatsoever.

CROSS EXAMINATION

BY MR. AMADEE:

Q Now, Officer Belsom, how long have you been on the police force?

A Four years.

Q You say you have never studied photography?

A I didn't say anything to that effect.

Q Well, did you?

A I have been doing photographic work since December. No, I haven't studied anything.

Q In other words, you never went to a photography school?

A No, sir.

Q Did you ever study under another photographer, expert?

A I don't know if any of them—I don't know who in my department is classified as an expert.

Q Maybe none of them, I don't know. You might not have any experts, you are saying?

THE COURT: Ask a question: Quit making a speech.

[fol. 61] BY MR. AMADEE:

Q Do you have any expert photographers?

THE COURT: He isn't qualified to answer that. As him who, if anyone, he was taught by.

BY MR. AMADEE:

Q Who were you taught by, Officer Belsom?

A Sgt. Gorman, Lieutenant O'Neill, Lieutenant Lartigue.

Q So you know how long they have been engaged in photography?

A I do not.

Q How long did you study under Sgt. Gorman?

A I have been working there since December studying undera all three people.

Q December when?

A December of 1967; the exact date, I do not know.

Q Then you have been in this for some six months?

A Yes, sir.

Q That is the extent of your experience?

A Yes, sir.

Q Do these men still work with the Department?

A Yes, sir.

Q They are still working in photography?

A Yes, sir.

Q They are your supervisors?

[fol. 62] Yes, sir.

Q They are here in this building now?

A They were when I came up here.

Q I mean, they were available to a Court subpoena?

A Yes, sir.

Q Now, when you say this was in your possession, you mean that it was not in possession of Sgt. Gorman?

A Yes, sir.

Q And it was not in possession of Lt. O'Neill?

A Right.

Q And it was not in possession of Lt. Lartigue?

A Right.

Q Did they have anything whatsoever to do with this?

A No, sir.
Q Did not supervise you on things like that?
A I took that picture by myself; I developed it by myself and I printed it by myself.
Q Did you put the place where it was taken?
A It is in the book in my office; it is not on there.
Q It is not on the picture?
A We put "show-up" as the location.
Q It is not on here?
A No, sir.
Q Why not?
A It is not on the stamp.
[fol. 63] Q I don't hear you?
A It is not on that stamp. There is no place for me to put it: I have never been told to.
Q It is impossible to put that on the stamp?
MR. FOTI: That is immaterial.
THE COURT: Objection sustained.
MR. AMADEE: No, your Honor.
THE COURT: Objection is sustained.
MR. AMADEE: I'd like to reserve a Bill to the ruling of the Court making the question propounded by counsel and your Honor's—any member of the Jury who is dissatisfied, I think he ought to get off of the Jury because this trial, this is going to last a long time.
I would ask that the juror be excused if he has remarks to make. I think you hear it also.
THE COURT: I didn't hear anything.
MR. AMADEE: Well, I will forget it.
[fol. 64] THE COURT: Gentlemen, if anybody did make any comment—I don't know if anybody did—please don't. Reserve your comments about this trial until when you get together to deliberate: Not before then.
You better be sure what you are talking about before you make accusations about people.
MR. AMADEE: I could almost point the man out but I don't want to do that. I looked in his face.
THE COURT: You better be.
Gentlemen, just accept what I told you.
MR. AMADEE: Your Honor, because of that at this time I'd like to move for a mistrial.

THE COURT: Based on you making an accusation at a juror?

MR. AMADEE: No, on the basis that —

THE COURT: Motion is denied.

MR. AMADEE: On the basis that the Jury made comments detrimental to the rights of this man because [fol. 65] they are either too tired or they think that I am a fool or something like that. I'd like to move for a mistrial.

THE COURT: You want all of that in the record: What you just characterized yourself?

MR. AMADEE: Yes, sir, as a fool.

THE COURT: Put it in the record. The motion for a mistrial is denied.

MR. AMADEE: At this time I'd like to reserve a formal Bill of Exceptions making my motion for a mistrial, making my comments, making whatever comments might have been caught by the stenographer from some of the jurors—

THE COURT: The only think that this stenographer is going to catch is what is testified to or stated by somebody. There is no evidence in there that there was any comment made, so don't try to inject one in your Bill when there is none in the record.

MR. AMADEE: I heard some sighs, your Honor.

I will proceed.

[fol. 66] BY MR. AMADEE:

Q You said you didn't put the place where this was taken?

A That is right, sir.

Q The book that you are talking about, where is it?

A It is in my office.

Q Is it under lock and key?

A It is in the shelf in the office, not under lock and key.

Q It is available to this Court?

A Yes.

Q I could see that book?

A I assume you could.

Q Now, this was taken by you exactly like it was here? I mean, you snapped what you saw there?
A Yes, sir.
Q You snapped what the camera saw?
A Yes.
Q Why is that black line there—you see it?
A Because in the show-up room the panel is divided by sections and that happened to be a metal clamp that holds the glasses together.
Q Do you know who designed the show-up room?
MR. FOTI: Your Honor, this is immaterial.
[fol. 67] THE WITNESS: I have no knowledge.
THE COURT: Do you really want that question answered?
MR. AMADEE: No, your Honor. Strike it.
THE COURT: Well, I didn't think you did.
MR. AMADEE: I don't want Mr. Foti to start screaming.

BY MR. AMADEE:

Q You didn't set up the line-up?
A No. I had nothing to do with the line-up except taking a picture.
Q Was it already set up when you got there?
A Yes, sir.
Q Was it set up while you were there?
A No, sir.
Q Do you know who set it up?
A I have no idea.
MR. AMADEE: Thank you, sir. No further questions.
MR. FOTI: At this time, the State offers, introduces and files—
MR. AMADEE: Objection.
[fol. 68] THE COURT: Will you please wait a minute.
MR. FOTI: The State offers in evidence S-1.
MR. AMADEE: Objection, your Honor. May I be heard?
THE COURT: Make your objection.

MR. AMADEE: Number One, there is no place on it—I don't know where it was taken; I am not going to guess. Number Two, this man is not an expert. He is learning to be an expert studying under men who are available as experts and could have been used. This is a very serious crime. I'm not going to talk about nothing else other than that. It is a serious crime. The man doesn't know too much about what happened, and that is good.

MR. FOTI: Your Honor--

THE COURT: Make your objection.

MR. AMADEE: So I object to this as not being the best evidence.

[fol. 69] THE COURT: Objection is overruled.

MR. AMADEE: To the ruling of the Court, counsel would like to reserve a formall Bill of Exceptions making S-1—I think that is what he designated it—all of the questions propounded by both the State and defense to Officer Belsom and all other parts of the record a part thereof.

THE COURT: Gentlemen, I am going to ask you a serious question and I want you to give some serious thought to what I ask you. We all are human and we all have feelings and everything that goes with it. Did the remarks by Mr. Amadee in anyway get to any of you to the point that you think it might interfere with your ability to decide this case: I mean, if you have any doubts in your mind, then I want you to tell me. I want to be sure that nothing has happened here that has in anyway prejudiced this client's right to have a fair trial, and when I use the word "prejudice", I mean it in the [fol. 70] sense that human nature being what it is in all of us. If any of you have any such doubts, don't be afraid to tell me. If you don't, fine, but if you do, fine: I want to know.

MR. AMADEE: Could I approach the Bench on that?

THE COURT: There is no need to approach the Bench. If you want to say anything in response to what I said to this Jury—

MR. AMADEE: That is correct.

THE COURT: Well, say what you want to say.

And let the record further show that all of the jurors responded in the negative.

MR. AMADEE: Your Honor, I would move to be given an opportunity, either me or the State or the Judge to ask them specifically whether or not their minds are pro-State or Anti-Defense.

THE COURT: I have asked these jurors and I am satisfied with their answers and that is good enough for me. Your motion is denied.

[fol. 71] MR. AMADEE: To the ruling of the Court on the question of whether or not these jurors are Pro-State or Anti-Defense or Pro-Defense and Anti-State, counsel would-like to object and reserve a formal Bill of Exceptions making the entire record and all questions, et cetera, a part thereof.

THE COURT: Call your next witness.

* * * *

PATROLMAN GUSTAVE TURGEAU, after having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation, Officer?

A Gustave Turgeau, New Orleans Police Department.

Q Were you so employed on December 26, 1967?

A Yes, sir. I was.

Q Did you have occasion at approximately three-forty-five, between the hours of three-forty-five and four o'clock to respond to a call on Third Street?

A Yes, sir, I did.

Q From one Mr. Eugene Frischertz?

[fol. 72] A Yes, sir.

MR. AMADEE: I am going to object to any further leading. I think that is enough.

THE COURT: Ask you next question.

BY MR. FOTI:

Q Would you please tell the Court what occurred on your arrival on the scene?

A When I arrived on the scene, I learned from Mr.—

THE COURT: Don't go into what anybody told you: Just what your investigation consisted of without any conversation you had with anyone?

THE WITNESS: Through investigation I learned that a driver for the Coca-Cola Company of New Orleans had been held up by a Negro male. He had been held up at gunpoint and $600.00 had been taken. I took a description of this Negro male; I put it over the Police radio; made my report—

Q This was in the City of New Orleans?

A Yes, sir.

MR. FOTI: No further questions.

[fol. 73] THE COURT: Do you have any questions of this witness?

MR. AMADEE: Yes, sir.

THE COURT: Well, ask them.

MR. AMADEE: Your Honor, pardon me. I was just reflecting.

CROSS EXAMINATION

BY MR. AMADEE:

Q You say the driver had been held up by a Negro male?

A Yes, sir.

Q It couldn't have been a white male?

A He told me a Negro.

THE COURT: We are not going to go into what the man told him.

MR. AMADEE: No, I say, it could not have been.

THE COURT: I say we are not going to go into what anybody told him: That is hearsay testimony.

MR. AMADEE: Oh, I see.

Well, your Honor, I would move that all of the testi-

[fol. 74] mony be stricken from the record as all hearsay.

THE COURT: Ask a question.

There is no such thing in our law as a motion to strike testimony. Proceed.

MR. AMADEE: Well, I will move that the Jury be advised to disregard the testimony.

THE COURT: Proceed.

BY MR. AMADEE:

Q You say you put something out over the radio?
A A description of the wanted subject.
Q Is there a record of that description?
A Yes, sir.
Q I mean, I don't want it from you now: Is there a record that could be obtained somewhere?
A Yes, sir.
Q Where is it?
A In my report. I believe the District Attorney has it.
Q In your report?
A Yes, sir.
Q Showing the description?
A Yes, sir.
[fol. 75] Q Did you show the witness any mug shots?
A No, sir.
Q Did you have anything to do with the line-up?
A No, sir.
Q Did you have anything to do with the post investigation on this matter?
A No, sir.
MR. AMADEE: No further questions.
THE COURT: All right, Officer. Step outside, don't discuss your testimony with anyone.
Call your next witness.

* * * *

LAWRENCE VIGURIE, after having been first duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation, sir?
A Lawrence John Vigurie, Sergeant, New Orleans Police Department.
Q Were you so employed on January 20, 1968?
A Yes.

Q Did you have occasion on that date to arrest one Frank Johnson for the crime of armed robbery?
[fol. 76] A Yes.
Q Is the person you arrested in Court today?
A Yes.
Q Would you point him out, please?
A Sitting next to Mr. Amadee (indicating).
MR. FOTI: Let the record reflect the witness has adequately identified the defendant.
No further questions.

CROSS EXAMINATION

BY MR. AMADEE:

Q You say you arrested him?
A I was one of the arresting officers, yes.
Q You were one of eight?
A One of what?
Q One of eight arresting officers?
A One of the arresting officers.
Q Now, I am asking a specific question: Were you one of eight or more?
A No, I don't think there were eight. There was possibly six men, I think it was.
Q Besides yourself?
A I think six, a total of six.
Q Where did you proceed to for the arrest?
A To the subject's address.
Q And did you know the subject's address at that time?
[fol. 77] A Did I know his address?
Q Where you arrested him from, yes?
A We received information that he did reside there, yes.
Q Well, I want to know that address?
A 2135 Philip.
Q You found him there?
A I found him under a bed at that address.
Q But you found him there: I just want to know.
A I am trying to—yes, I found him at that address.
Q You arrested him. Did you arrest him?

A Yes.
Q You had a warrant for his address?
A I did not have a warrant.
MR. FOTI: Your Honor, I am going to have to object to any further questions on this.
THE COURT: Objection sustained.
MR. AMADEE: I would like to reserve a Bill making all of the things we filed, you know, your Honor, and this question and the answer of the officer, the objection of the District Attorney and the ruling of the Court and my attempt a part thereof.

[fol. 78] BY MR. AMADEE:

Q Now, how was the arrest effected?
MR. FOTI: Your Honor, I am going to have to object to any testimony about that except that the only question at issue is: Was this the same man that was arrested on that day.
THE COURT: What do you mean?
MR. AMADEE: Was he handcuffed?
MR. FOTI: This is immaterial.
MR. AMADEE: I don't think so.
THE COURT: It is immaterial.
Objection sustained.
MR. AMADEE: I'd like to reserve the same Bill, your Honor.

BY MR. AMADEE:

Q How long after you arrested him at 2135 Philip Street was he taken to Central Lockup?
A He was taken immediately to the Detective Bureau.
Q Where is that at?
[fol. 79] A Right downstairs on the next floor.
Q Do you know the number of that office?
A 153.
Q That is on the first floor of the Criminal District Court?
A Yes.
Q About what time did you say he was arrested?
A About six a.m.

Q In the morning?
A Yes.
Q It could have been five-thirty?
A I would say it was around six a.m.
Q It couldn't have been—I would say around six o'clock in the morning.
Now, where did you say you took him to: 153. About what time did you arrive there?
A Possibly twenty minutes.
Q In other words, this means you got there somewhere before six-thirty, give or take a few minutes?
A Yes.
Q Now, did you participate in questioning of him?
MR. FOTI: Your Honor, I am going to have to object to this question.
[fol. 80] THE COURT: This is not relevant at this time.

BY MR. AMADEE:

Q Well, were you present at any time of questioning?
THE COURT: This is not relevant at this time either.
MR. AMADEE: I read you loud and clear, Judge. No further questions.

REDIRECT EXAMINATION

BY MR. FOTI:

Q Officer Vigurie, I only have one question: At the time you arrested Frank Johnson, did you find a weapon in his possession at the time you arrested him?
A No.
MR. FOTI: No further questions.

RE-CROSS-EXAMINATION

BY MR. AMADEE:

Q Have you ever found any weapon in his house, on his possession or what-not connected with this?

A I don't know if you would cover it by what not:
Q On him?
THE COURT: Don't say what anybody said now.
[fol. 81] Q I asked you: On him or his premises?
THE COURT: Did you ever find any weapon? Be specific in your answer.
THE WITNESS: Yes. There was a weapon found.

BY MR. AMADEE:

Q On him?
A Not on his person.
Q Or his premises?
A You said or what-not: I don't know what what-not covers.
Q On him or his premises?
THE WITNESS: Not on him or his premises.
MR. AMADEE: I am satisfied.
MR. FOTI: At this time the State will rest subject to the right of rebuttal.
MR. AMADEE: I need about two or three minutes to collect my thoughts.
THE COURT: You got two or three minutes.
[fol. 82] MR. AMADEE: May I call my office, your Honor?
THE COURT: You may call your office when we have a recess: We don't take recesses to call offices here.
MR. AMADEE: When is the next recess, your Honor?
THE COURT: When the lunch gets here.
MR. AMADEE: Would I have time to take my medicine?
THE COURT: Of course, Mr. Amadee, when lunch-time comes.
MR. AMADEE: No, but I want to take my medicine.
THE COURT: You can take your medicine, too, but please call a witness.
MR. AMADEE: Call the defendant.

* * * *

SUPREME COURT OF LOUISIANA

No. 49,861

STATE OF LOUISIANA

vs.

FRANK JOHNSON

On Appeal from the Criminal District Court, Section "G", Parish of Orleans, State of Louisiana. Honorable Frank J. Shea, Judge Presiding.

OPINION AND JUDGMENT—Tuesday Jan. 20, 1970

HAMLIN, Justice:

Defendant was charged by bill of information with the crime of armed robbery. He was tried by a jury of twelve, convicted (the verdict was nine to three), and sentenced to serve thirty-five years at hard labor in the Louisiana State Penitentiary. He appeals to this Court from his conviction and sentence and presents for our consideration two specification of errors, which recite:

1. The arrest of appellant was illegal, and the ensuing line-up identification while appellant was still illegally detained should have been suppressed and excluded from evidence.

2. The verdict of guilty in which only nine out of twelve jurors concurred denied appellant due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Twenty-five bills of exceptions were reserved in this matter. However, before argument in this Court, counsel for the defendant stated that all bills taken at trial were without merit. Therefore, contrary to our usual format in writing a criminal case, herein infra we shall only consider the specification of errors urged supra.

The testimony taken on the hearing of the motion to suppress and on trial discloses in substance the following account of defendant's arrest, booking, line-up, the incidents of the crime charged, and the actions of the victim following his being robbed by an armed man:

On December 26, 1967, at approximately 3:30 P.M., (the weather was clear and the sun was shining) Eugene Frischertz, a route salesman for Coca Cola Bottling Company, had just made a delivery at Brown's Grocery, 2139 Third Street, New Orleans, Louisiana, when a man, whom he saw from the mirror of his truck (there was a mirror on the right side and on the left side of the front of the truck), approached the door of the truck, brandished a revolver at him and demanded that he give him all of his money.[1] Frischertz gave the robber between $500.00 and $600.00 of money belonging to Coca Cola Bottling Company and $31.00 of his own money, and the robber fled. Frischertz reentered the grocery store and summoned the police; they arrived within approximately fifteen minutes, and Frischertz related the details of the robbery and gave them a complete description of the robber—weight, hair and clothing. Later, Frischertz went to the Detective Bureau where he was shown mug shots of suspects; he did not identify any of the pictures as being that of the defendant, but he pointed out characteristics—build and facial make-up—of the robber similar to those of the parties appearing in the mug shots. Thereafter, at a line-up, which we shall discuss infra, he identified the defendant as the man who had robbed him.

The robbery of truck drivers was prevalent in the City of New Orleans at the time Frischertz was forcibly robbed. The police were conducting an investigation for the purpose of arrest, and Lieutenant Theodore Feld, New Orleans Police Department, Detective Bureau, Robbery Division, was in charge. On the hearing of the motion to suppress, Lt. Feld testified:

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[1] Frischertz was seated on the right side of the truck by the door; he was accompanied by two helpers, one of whom drove the truck.

"A. On the 18th of January we received information from a confidential informant—I didn't receive it—my superior, Captain Newman received it from one of his informants that Frank Johnson and Hayes, Harold Hayes—

[Colloquy]

"A. Saying that these two subjects were involved in an armed robbery of truck drivers. So I sent one of the men over to the B of I to get photographs on subjects by the name of Harold Hayes and Frank Johnson in a group and have one of the men bring it to one of the victims who was employed by the Brown's Velvet. The man looked at the pictures and identified Frank Johnson and also a photograph of Harold Hayes. He initialed the same with the date and then that gave us probable cause to arrest him. The man positively said that was the man that held him up."

Marion Catalano, an employee of Brown's Velvet Ice Cream, Inc., had been the victim of about three armed robberies; he identified defendant's photograph as that of a man who had committed a robbery on him. At Lt. Feld's instruction, Detective John Lanza secured the photograph identification. This was done shortly after Captain Newman, Assistant Chief of the Detective Bureau, communicated to Lt. Feld the information given to him by an informant, January 18, 1968.

On January 20, 1968, at approximately 6:00 A.M., Lt. Feld and Sgt. Lawrence John Vigurie arrested the defendant at his residence, 2135 Philip Street, New Orleans, Louisiana, for the robbery of Brown's Velvet Ice Cream, Inc. truck driver Catalano, but at the time of arrest Lt. Feld was not specific with the defendant; six officers were involved in the arrest. Lt. Feld testified that he knocked on Johnson's front door and was admitted by Mrs. Johnson and a male other than Johnson; that they were shown the officers' identification and told that the officers were looking for Frank Johnson. Defendant was taken from under his bed by Sgt. Vigurie,

who told him that he was being placed under arrest for armed robbery; he was allowed to get dressed and was then handcuffed. Lt. Feld did not have an arrest warrant, but he testified that there was no reason for not securing one.

A search was made of the defendant's house, but we are not herein concerned with any fruits of the search. The issue of search and seizure connected with an arrest is not an issue herein involved.

Defendant was brought to the Detective Bureau at approximately 6:45 A.M., where he was apprised of his constitutional rights [2] and then interrogated. A short time later he accompanied and assisted the officers in the arrest of a suspect. He was returned to the Detective Bureau about mid-morning and then booked with a number of armed robberies.[3] Lt. Feld testified, "Catalano was the original booker and that is what we went out there to arrest him on."

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[2] On hearing of the motion to suppress, defendant testified:

"Q. Did they then come in to ask you if you wanted to make any statements?

"A. Yes, sir. About twenty, twenty-five minutes later they came into me and they read off of a piece of paper something to the fact pertaining to the fact that they advised me of my rights, and I told them I didn't want to make any statements; I didn't have anything to say.

"Q. Did you sign such a piece of paper, an arrestee form or anything like that?

"A. Yes, I signed the form that they had, notified me of my rights as an arrestee."

The records contain a form, *Rights of an Arrestee or Suspect*, January 20, 1968, 7:10 A.M.; it is signed by Det. John J. Lanza, and the statement is made that Sgt. Larry Vigurie was present. The form contains a check mark by the notation, *Refused to Sign;* this notation appears under the signature of the arrestee or suspect, which in this case is blank.

[3] On hearing of the motion to suppress, defendant testified: "Yes, sir; about four and a half, about five hours later on that evening they came back. They came upstairs and brought us back downstairs and they rebooked us with another armed robbery, and about fifteen minutes later, maybe ten, they rebooked us with another armed robbery."

A line-up was held at the Detective Bureau on January 23, 1968, and victims of all truck driver holdups in the location herein involved were requested to attend. Eugene Frischertz, the instant victim, was present and, as stated supra, identified defendant as the man who had robbed him on December 26, 1967. The testimony of Frischertz is in part as follows:

"Q. Now, let's get to the line-up, Mr. Frischertz: What happened at the line-up, tell us about it in your own words?

"A. I identified this man as being the man that held me up.

"Q. Did you identify him by a number?

"A. No.

"Q. If I showed you a picture, would it refresh your recollection: Is that the line-up?

"A. Yes, sir.

"Q. Were there a number at that date?

"A. There were.

"Q. I ask you if: Did you identify them by number?

"A. I did not. I identified him, then picked the number.

"Q. But you did identify by number?

"A. Not by number. I identified his face.

"Q. And then tied a number in with it?

"A. Right.

"Q. But there was always a number around his neck, correct?

"A. Right.

"Q. And that number was four?

"A. Right.

"Q. And did you identify him as to position in the line-up?

"A. No.

"Q. Do you know how many persons were in the line-up: I just showed it to you?

"A. Seven.

"Q. Who was the middle man?

"A. The middle man?

"Q. Yes. Number four—three on one side and three on the other—who was the middle man?

[Colloquy, and objection sustained.]

"* * *

"Q. When you saw him, you immediately recognized him, is that correct?

"A. I did.

"Q. No officer was sitting beside of you prompting you?

"A. No.

"Q. No one had made any suggestions to you at the Detective Bureau?

"A. No."

Rene Belsom, a patrolman employed in the Bureau of Identification, having as one of his primary duties the taking of photographs, testified that he took a line-up picture on January 23, 1968. He identified S-1 offered in evidence as the picture he had taken; it is a line-up pose of seven men with defendant appearing as No. Four.

Byron Legendre, an attorney connected with Legal Aid, was present at the line-up of January 23, 1968. He testified:

"I went over to the Federal Lockup [Orleans] and interviewed a number of people who were booked at that time with the crime of armed robbery. I interviewed them on this premise: Whether or not they had a counsel or a lawyer of their own at that time and for those who said they did not, I told them that I would be available as their attorney for the purpose of the line-up alone to make sure that they got a fair line-up, and Number Two, to be able to report to their attorneys at a later date as to what transpired at that line-up. And to each of these men I gave my card if I had one available and to each of them I promised I would let them know the results of the line-up after it was finished. Mr. Johnson was one of these men who said he did not have counsel."

Mr. Legendre further stated:

> "These people are instructed by me, the suspects, are instructed by me to make a choice of the number they wish: They can stand next to whom they please. And the numbers are so chosen and then the rest of the people are handed out the numbers. Only the suspects get a choice of what number they want: They don't get a choice of who they stand next to. Once they have their numbers and the other numbers are given out, they are placed against the wall and then I have an opportunity to let the police know my appreciation of what I see."

Lt. Feld testified that Mr. Legendre represented the defendant at the line-up. On the hearing of the motion to suppress, defendant himself testified that he went to a line-up on January 23, 1968. He said that he had an attorney—he thought that he was Mr. Legendre from Legal Aid. He stated that the attorney represented him at the line-up and talked with him before same was held, advising him of his rights.

On February 14, 1968, a bill of information was filed against the defendant. He was charged with a violation of LSA-R.S. 14:64, in that "while armed with a dangerous weapon, to wit: a pistol, robbed one EUGENE FRISCHERTZ of Six Hundred and Thirty-One ($631.00) Dollars in United States Currency, * * *"

SPECIFICATION OF ERRORS NO. 1

In this Court, counsel for the defendant urge:

A. The arrest was illegal because the arresting officer did not himself have the probable cause required of warrantless searches under the Louisiana and United States Constitutions.

B. The arrest of appellant was illegal because the arresting officer intentionally declined to obtain a warrant so that he could search "incidental" to the arrest.

C. The identification of appellant at a line-up after his illegal arrest, and while still illegally detained should have been suppressed and all evidence pertaining to it excluded at trial.

In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, (1963) the United States Supreme Court said:

> "* * * It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, see Henry v. United States, 361 U.S. 98, 101, 80 S.Ct. 168, 170, 4 L.Ed.2d 134, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed, Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543—must be measured by the facts of the particular case. * * *
>
> "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. * * *
>
> "* * * We have held that identification of the suspect by a reliable informant may constitute probable cause for arrest where the information given is sufficiently accurate to lead the officers directly to the suspect. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. * * *"

In the Henry Case mentioned above, 80 S.Ct. at 171, (1959) the United States Supreme Court said:

> "Evidence required to establish guilt is not necessary. * * * On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. * * * It is important, we think, that this requirement be

strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. * * *"

In Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436, (1948) the United States Supreme Court was in essence considering the legality of a search, but with respect to arrest it stated:

"The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the persence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty."

"Probable cause has been defined as a reasonable grounds for belief of guilt. It exists where the facts and the circumstances within the officer's knowledge are sufficient in themselves to warrant a man of reasonable caution in the belief than an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879." State of Louisiana v. Walker, 206 F. Supp. 544, Cert. Denied, 371 U.S. 957, 83 S.Ct. 514, 9 L.Ed. 504, (1963).

"An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement whether or not trial or conviction ultimately follows." Terry v. State of Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889, (1968). Cf.

Sibron v. State of New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L.Ed.2d 917.

"A case of arrest without a warrant necessitates striking a balance as to (a) considerations respecting the rights of the individual citizen taken into custody, and (b) consideration respecting the responsibility of police officers for the safety and security of all members of the community; *i.e.*, the propriety of law enforcement or police action. It is a problem of value judgment. The test, purely and simply, is one of reasonableness, considering the time, the place, and the pertinent circumstances." Plancich v. Williamson, 57 Wash.2d 367, 357 P.2d 693, 92 A.L.R.2d 559.

"* * * That the officer had time to have obtained a warrant and failed to do so does not make an otherwise legal arrest or legal search and seizure illegal. Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145." State of Louisiana v. Walker, 206 F.Supp. 544, 546.

In Louisiana an arrest by an officer without a warrant may be made when "the peace officer has reasonable cause to believe that the person to be arrested has committed an offense although not in the presence of the officer." LSA-C.Cr.P., Art. 213(3). "The law has not ordained hard and fast rules for the determination of reasonableness. The facts and circumstances of each case must be judged separately, with wide latitude accorded the trier of facts. That determination should not be overturned unless there is clear error." State v. McIlvaine, 247 La. 747, 174 So.2d 515, 520. Cf. State v. Aias, 243 La. 946, 149 So.2d 400; State v. Christiana, 249 La. 247, 186 So.2d 580; State v. Pagnotta, 253 La. 770, 220 So.2d 69; State v. Devenow, 253 La. 796, 220 So.2d 78. "* * * the Government has the burden of showing probable cause to believe that a crime had been or was being committed both in obtaining a warrant prior to arrest and in sustaining the legality of an arrest without a warrant. * * *" United States v. Rivera, 321 F.2d 704. Cf. Beck v. State of Ohio, 379 U.S. 89,

85 S.Ct. 223, 13 L.Ed.2d 142; 6 C.J.S. Arrest, Sec. 5 a., p. 580.

We find that defendant's arrest was legal. At the time of his arrest armed robberies were widespread in the City of New Orleans. The facts supra disclose that Captain Newman had informants on whom he relied. One confidential informant conveyed reliable information to him, and this information pointed out the defendant as having committed some of the then recent truck driver robberies. The information was immediately relayed to Lt. Feld who trusted and believed his superior officer. The Lieutenant was alert to the tense situation existing among truck drivers handling money receipts. Sgt. Vigurie was a co-worker with Lt. Feld. There was a chain of command, which is usual for all large operations whose procedures are intricate, involving many police officers; six officers were detailed to the instant arrest.

A prudent man of reasonable caution, considering the time, place, and pertinent circumstances,—and having the facts available to him which Lt. Feld had in his personal possession and immediate knowledge (although they might not have been written on papers on his person)—would, in our opinion, have certainly believed that the defendant was guilty of armed robbery. Again, in our opinion, there would have been more than suspicion. Substantiating this conclusion is the fact that Marion Catalano, the Brown's Velvet driver, had identified a mug shot of the defendant as that of the man who had robbed him.

We conclude that Lt. Feld, Sgt. Vigurie, and the other officers—under the totality of the circumstances—acted under more than good faith and suspicion; they had probable cause to arrest the defendant. There was no reason why a warrant of arrest could not have been secured, but the failure to secure the warrant did not invalidate defendant's arrest. State of Louisiana v. Walker, supra.

The officers did not break into defendant's home; there was no forceful entry; they were admitted by defendant's wife. Therefore, the entry was legal. Cf.

Sabbath v. United States, 391 U.S. 585, 80 S.Ct. 1755, 20 L.Ed.2d 828, (1968).

When arrested, defendant was told that he was being arrested for armed robbery. This statement was sufficient to apprise him why his freedom of movement was suffering an interference.

We find that the State bore its burden of proving that defendant's arrest was constitutional and legal, and that there was probable and reasonable cause for such. The sum total of the facts and circumstances of this prosecution more than warrant such a conclusion. United States v. Elgisser, 334 F.2d 103, (1964).

The fact that defendant was booked some four hours after he was arrested does not make his arrest illegal. As stated supra, he was interrogated, but none of his statements were introduced in evidence. Defendant suffered no deprivation of his constitutional rights.

Having found that the defendant was legally arrested, we proceed to a determination of the constitutionality vel non of the instant line-up. When the line-up occurred, defendant was in legal custody and under no arrest. We find no impairment, Federal or State, to a line-up conducted under constitutional standards. Here, as stated supra, defendant was represented by able counsel at a critical stage of his prosecution; there was no prohibited self incrimination.[4]

"We have no doubt that compelling the accused merely to exhibit his person for observation by a

[4] "Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] * * * as the trial itself.' Powell v. State of Alabama, supra, 287 U.S. at 57, 53 S.Ct. at 60, 77 L.Ed. 158. Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an 'intelligent waiver.' See Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 834, 8 L.Ed. 2d 70. * * *" United States v. Wade, 87 S.Ct. at 1937, (1967).

prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. * * *" United States v. Wade (1967) 388 U.S. 218, 87 S.Ct. 1926, 1930, 18 L.Ed. 1149.

We conclude that the pretrial line-up herein was legal, and that the picture of the line-up (S-1), which includes as No. Four the photograph of the defendant, was properly admitted in evidence. We further find that evidence of the pretrial line-up identification by the victim was properly admitted in evidence. There was no need for suppression.

The record also discloses that there was an in-court identification at trial. The testimony with respect to this identification is as follows:

"Q. Do you [victim] see this person in Court today?
"A. I do.
"Q. Would you point him out, please?
"A. That gentleman right there (indicating).
"Q. Is this the same gentleman that held you up on December 26, 1967?
"A. It is."

Defendant suffered no violation of his constitutional rights by either the pretrial line-up identification or by the in-court identification. The trial judge was correct in admitting such in evidence. Cf. State v. Allen, 251 La. 237, 203 So.2d 705; State v. Miller, 254 La. 73, 222

So.2d 862; State v. Lewis, —— La. ——, —— So.2d ——.

Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), is not apposite to the instant matter. No legal arrest was involved in that case. The United States Supreme Court distinctly said, "The legality of his arrest was not determined by the Mississippi Supreme Court." The Court then held the fingerprints taken during a period of detention unconstitutional evidence which could not be admitted during trial.

Specification of Errors No. 1 is without merit.

SPECIFICATION OF ERRORS NO. 2

We find no merit in Specification of Errors No. 2 which contends that the verdict of guilty in which only nine out of twelve jurors concurred denied appellant due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Article 782 of the Code of Criminal Procedure provides:

> "Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. * * *"

The Sixth Amendment to the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the ac-

cusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Thus far, the United States Supreme Court has not ruled that the Sixth Amendment compels the States under the Fourteenth Amendment to the United States Constitution to require that the verdict of the jury be unanimous in a criminal prosecution such as the instant one. Herein, therefore, our ruling in State v. Schoonover, 252 La. 311, 211 So.2d 273, which upheld the ruling of the trial judge refusing to charge the jury that, "The verdict of the Jury, either to acquit the defendant or to convict him [armed robbery] must be by the unanimous vote of the entire jury," is applicable. In Schoonover we said, "These arguments do not impress us. We are entirely satisfied that the Constitution and laws of our state provide a system for this prosecution in which fundamental fairness and even-handed justice can be and was dispensed. * * *" We are still of the same belief.

Specification of Errors No. 2 is without merit.

For the reasons assigned, the conviction and sentence are affirmed.

* * * *

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 49,861

STATE OF LOUISIANA, APPELLEE

vs.

FRANK JOHNSON, APPELLANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Frank Johnson, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Louisiana affirming the judgment of conviction, entered herein on January 20, 1970.

This appeal is taken pursuant to 28 USC § 1257(2).

/s/ Richard A. Buckley
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Appellant
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Phone: 523-1297

SUPREME COURT OF THE UNITED STATES

No. 5161, October Term, 1970

FRANK JOHNSON, APPELLANT

v.

LOUISIANA

ON CONSIDERATION of the motion of the appellant for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

November 9, 1970

SUPREME COURT OF THE UNITED STATES

No. 5161, October Term, 1970

FRANK JOHNSON, APPELLANT

v.

LOUISIANA

APPEAL from the Supreme Court of the State of Louisiana.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 9, 1970

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